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No. 08 940 JAN 23 2009

In The

Supreme Court of the United States

DANIIL V. ZHUK,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal jury trial involving multiple counts, if deadlocked jurors enter into an agreement to resolve their impasse by resort to a vote-trading or count-bartering arrangement, whereby conscientiously held not-guilty votes of certain jurors as to one count are to be relinquished in exchange for the relinquishment of conscientiously held guilty votes of other jurors as to another count, does the arrangement constitute juror misconduct, in derogation of the jury trial and due process rights of the accused?

LIST OF PARTIES

Petitioner, Daniil V. Zhuk, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, the State of California, is represented by Deputy Attorney General Susan J. Orton, of Sacramento, California.

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PETITION FOR A WRIT OF CERTIORARI

Daniil V. Zhuk petitions for a writ of certiorari to review the judgment in this case of the California Court of Appeal, Third Appellate District.

OPINIONS BELOW

The opinion of the California Court of Appeal, App. 1a-79a, is unpublished, but is available online at *People v. Zhuk*, No. C047365, 2008 Cal.App. Unpub. Lexis 5789 (Cal.App. Jul. 18, 2008). The order of the California Court of Appeal denying Mr. Zhuk's petition for rehearing and modifying its opinion, App. 80a-81a, is unpublished. The order of the California Supreme Court denying Mr. Zhuk's petition for discretionary review, App. 82a, is unpublished.

JURISDICTION

The California Supreme Court denied Mr. Zhuk's petition for discretionary review on October 28, 2008. App. 82a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Clause 3 of the Constitution provides in relevant part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

California Evidence Code section 1150(a) provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Fed. R. Evid. 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to

any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

STATEMENT

This criminal case presents an issue concerning a troubling and recurrent phenomenon in jury deliberations: In multi-count or multi-defendant cases, deliberating jurors who find themselves deadlocked occasionally seek to overcome impasse by entering into vote-trading or count-bartering arrangements.[1]

[1] The propensity of jurors to resort to compromise in criminal cases "relates to numbers of counts and lesser included offenses." *Ballew v. Georgia*, 435 U.S. 223, 235 (1978) (plurality opinion) (citing R. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643, 680 (1975)).

Juror vote-trading is a form or compromise involving "the surrender by some jurors of their conscientious convictions in return for some like surrender by the other jurors." *Stewart v. State*, 437 A.2d 153, 155 (Del. 1981). Jurors trade their votes on counts, *United States v. Staach*, 987 F.2d 232, 236 (CA5 1993), and as to charges against co-defendants. *Hyde v. United States*, 325 U.S. 347, 383 (1912). Jurors in Mr. Zhuk's trial entered into an agreement to trade their votes as to various counts, including a murder charge. App. 19a, 21a, 23a-24a. The question presented is whether such vote-trading constitutes prejudicial misconduct warranting relief from any verdict tainted by the vote-trading.

That a verdict resulted from compromise is typically revealed by post-verdict juror affidavits or testimony. Although courts often refuse to consider such post-verdict information because of the common-law rule against impeachment of jury verdicts, *Tanner v. United States*, 483 U.S. 107, 117 (1987) (discussing the origins and application of the common-law rule); *Hyde v. United States*, 325 U.S. at 381-384 (strict application of the common-law rule prevents consideration of juror testimony about vote-trading arrangements made during deliberations), many courts do consider this type of information because, in many jurisdictions, there has been significant relaxation of the common-law rule. S. Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 514-517 (1988)

(discussing the "[l]iberalization" of the common-law rule in the states).[2] In cases where courts have considered evidence of juror vote-trading agreements, courts have diverged as to whether such agreements constitute misconduct. *Compare United States v. Staach*, 987 F.2d at 236-237 (concluding that a juror "compromise and trade off" arrangement is not "unpermitted") *and People v. Preston*, 76 Ill.2d 274, 391 N.E.2d 359, 365-366 (1979) (evidence of vote-trading during deliberations would not be "sufficient to invalidate the verdict") *with Whitfield v. State*, 867 A.2d 168, 173-174 (Del. 2004) ("verdicts which result from the surrender by some jurors of their conscientious convictions in return for some like surrender by others . . . are invalid") *and People v. Guzman*, 66 Cal.App.3d 549, 136 Cal.Rptr. 163 (1977) (characterizing juror vote-trading as an "illegal bargain" and prejudicial misconduct).

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[2] *Accord State v. Tate*, 256 Conn. 262, 291, 773 A.2d 308, 327 (2001) (Sullivan, C.J., concurring and dissenting) (referring to "the outdated rule that a juror is always incompetent to testify in impeachment of his verdict"); *State v. Callahan*, 119 Ariz. 217, 219, 580 P.2d 355, 357 (1978) (adverting to adoption of a state rule of criminal procedure "allow[ing] much more liberal use of juror testimony to impeach a verdict than was formerly permitted"); J. Mudd, *Note: Liberalizing the Mansfield Rule in Missouri: Making Sense of the Extraneous Evidence Exception after Travis v. Stone*, 69 Mo. L. Rev. 779, 786-787 (2004) (examining the Missouri judiciary's "retreat" from the strict rule); N. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 Mich. L. Rev. 2673, 2721 (1996) (noting that "the rule barring juror testimony eroded in some jurisdictions" in the second half of the twentieth century).

Under this Court's Rule 10, review on certiorari is warranted in order to address this unresolved issue.

A. Basis for Jurisdiction in the Lower Courts

This is a criminal case brought against Mr. Zhuk by the State of California. The Sacramento County Superior Court had original jurisdiction pursuant to Cal. Const. Art. VI, § 10 and Cal. Penal Code §§ 777, 790, and 791. The California Court of Appeal had jurisdiction of the appeal pursuant to Cal. Const. Art. VI, §§ 1 and 11(a). The California Supreme Court had jurisdiction over Mr. Zhuk's petition for discretionary review pursuant to Cal. Const. Art. VI, § 12(b).

B. Procedural Background

Charged with murder and other offenses, Mr. Zhuk and his co-defendant, Mikhael Vlasov, were tried jointly before separate juries in the Sacramento County Superior Court. App. 3a. Mr. Zhuk's jury convicted him of murder, attempted carjacking, and attempted robbery. The jury acquitted him on other felony charges. App. 1a-2a, Tr. 6390-6392.

After denying Mr. Zhuk's new trial motion based upon jury misconduct, the trial court sentenced Mr. Zhuk to life without the possibility of parole. App. 2a.

Mr. Zhuk appealed to the California Court of Appeal, Third Appellate District. In his appeal, he contended the jurors in his case had engaged in

various types of misconduct during deliberations, including vote-trading. Although the court found a juror's "injection of external information in the form of a claim of expertise . . . constitute[d] misconduct[,]" App. 34a, the court found the misconduct harmless. App. 35a-37a. The court rejected the other components of Mr. Zhuk's juror misconduct claim, including the vote-trading part of the claim App. 26a-30a, 37a-40a, and the court affirmed his conviction and sentence. App. 79a.

The California Supreme Court summarily denied Mr. Zhuk's petition for discretionary review. App. 82a.

C. Factual Background

Mr. Zhuk was charged by jury on various charges stemming from three unrelated incidents. All three incidents involved unsuccessful attempts to steal automobiles and/or assaults upon victims in vehicles. App. 1a-2a. Tragically, one of the incidents resulted in the death of an innocent victim, Cindy Chung. App. 1a, 3a-8a. Mr. Zhuk was charged as an accomplice to murder and other offenses in connection with Ms. Chung's death. App. 51a. He was charged with attempted robbery/carjacking and assault in connection with the other two incidents. App. 3a.

1. The Murder Case

On January 20, 2000, Mr. Zhuk was 17 years old. App. 1a, 3a. He was in the company of Mikhael

Vlasov and Peter Podgorodeskiy, who were 18 and 14, respectively. App. 1a, 3a-4a; Tr. 5019-5021; *People v. Vlasov*, No. C051788, 2007 Cal.App. Unpub. Lexis 9331, *7 (Cal.App. Nov. 20, 2007) (unpublished opinion). The three were driving together in Mr. Zhuk's vehicle near downtown Sacramento, California. Mr. Zhuk was the driver. App. 4a. Cindy Chung was driving in the same location in her BMW. App. 3a-4a. The young men followed Ms. Chung as she drove to an auto body shop owned by her father. App. 3a-4a. Mr. Zhuk parked at a location some distance away from the auto body shop. App. 4a. Ms. Chung's vehicle was not visible to Mr. Zhuk at the location where he parked. Tr. 2214, 3075.

Armed with a .22 caliber handgun, Mr. Vlasov exited Mr. Zhuk's vehicle. App. 4a-5a. Messrs. Zhuk and Podgorodeskiy remained in the vehicle. Tr. 3960. Mr. Vlasov shot and killed Ms. Chung as she was seated in the driver's seat of her vehicle. App. 6a.[3] He then returned to Mr. Zhuk's vehicle, and Mr. Zhuk drove away. App. 5a.

While Messrs. Vlasov and Podgorodeskiy testified Mr. Zhuk had given Mr. Vlasov the gun and had directed him to go to get the BMW, Tr. 2166-2167, 2213, 2248, 5085-5086, 5101-5103, 5201, Mr. Zhuk testified he was unaware of the presence of any gun and that he had simply driven to the location in

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[3] Mr. Vlasov testified he discharged the gun accidentally. Tr. 5115-5119.

question at Mr. Vlasov's request, without any idea that Mr. Vlasov was intending to steal a car. Tr. 4027, 4316. Mr. Zhuk's testimony regarding the gun was corroborated by testimony of a witness who had seen Mr. Vlasov come into possession of the gun the day before the incident. Tr. 3836.

2. The Other Incidents

a. Ingrid Wolbart

The night before the murder of Ms. Chung, a lone, young man with a Russian accent approached Ingrid Wolbart as she was loading groceries into her Mercedes outside a market in the Sacramento area. App. 8a. The young man demanded money from Ms. Wolbart and displayed a firearm. Ms. Wolbart angrily told her assailant she would not give him any money. He fled. App. 8a-9a.

In photographic lineups, Ms. Wolbart identified Messrs. Zhuk and Vlasov as the possible perpetrator. She was more certain in her identification of Mr. Zhuk than she was in her identification of Mr. Vlasov. In court, she identified Mr. Zhuk as the perpetrator. App. 9a.

However, Mr. Zhuk had an alibi. At the time of the incident, Mr. Zhuk was assisting family members in an effort to locate a cousin who had run away from home. Indeed, the parties stipulated at trial that Mr. Zhuk had made a missing person call to police regarding his cousin, and that the call was placed at a gas

station located a considerable distance from the location where Ms. Wolbart had been accosted. App. 11a-12a; Tr. 5657-5658.

Furthermore, Ms. Wolbart's physical description of her assailant matched Mr. Vlasov much more closely than it matched Mr. Zhuk. App. 11a-12a.

b. Karen Wood

Mr. Zhuk admitted that, on February 23, 2000, he attempted to steal Karen Wood's Mercedes. As Ms. Wood entered her vehicle after a doctor's appointment, Mr. Zhuk approached her and told her to get out of the vehicle. He said he had a gun. She exited the car, and Mr. Zhuk sat in the driver's seat. However, she had the key. And, when he was in the vehicle, she fled. As she was running away, she saw Mr. Zhuk running off in a different direction. App. 10a-11a.

D. Jury Deliberations

As noted above, Messrs. Zhuk and Vlasov were tried jointly, but with separate juries. App. 3a. Mr. Zhuk's jury convicted him on the counts associated with the Cindy Chung and Karen Wood incidents. App. 2a. One of the counts on which he was convicted in connection with the Cindy Chung incident was murder, based upon a felony-murder theory. App. 40a-42a. The jury acquitted him on the counts associated with the Ingrid Wolbart incident. App. 2a.

In support of a new trial motion, Mr. Zhuk presented the declarations of two jurors, which disclosed that the jurors engaged in vote-trading. App. 18a-24a. The jury had been deadlocked on the murder count and the Ingrid Wolbart counts. App. 26a. Some jurors believed Mr. Zhuk was guilty on all counts. App. 21a, 23a. However, "at least five to six of the jurors" believed he was not guilty on the murder charge. App. 19a, 23a. In an effort to break the deadlock, the jurors discussed entering into a vote-trading or count-bartering arrangement. App. 23a-24a. They discussed the possibility of the jurors who believed Mr. Zhuk was not guilty on the murder charge agreeing to vote guilty on that charge in exchange for not guilty verdicts on the Ingrid Wolbart counts. App. 21a, 23a-24a. Ultimately, the guilty verdict on the murder count, as well as the not guilty verdicts on the Ingrid Wolbart counts, resulted from this vote-trading arrangement. App. 21a, 24a.

Confronted with these juror declarations, the prosecutor filed a brief concerning the admissibility of the evidence offered by the jurors. Pursuant to Cal. Evid. Code § 1150, the prosecutor objected to the admissibility of some of the language in the declarations, but he did not object to any of the language regarding the vote-trading subject. CT[4] 1694, 1697.

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[4] "CT" refers to the clerk's transcript assembled by the Sacramento County Superior Court for Mr. Zhuk's appeal to the California Court of Appeal.

The trial court ruled the following statement from the declaration of Juror No. 3 was admissible:

> As the jury deliberations progressed, at least five to six of the jurors, including myself, had voted that Daniil Zhuk was not guilty of the murder charges. . . . [¶s] . . . There was a group of jurors who were voting guilty on all of the charges. They agreed to change their votes on the two counts concerning Ms. Wolbart if we would change our votes to guilty on the murder charge.

Tr. 6435.

The court ruled the following statement from the declaration of Juror No. 5 was admissible:

> Because there were a number of us who were voting not guilty on the murder charge, others who were voting guilty on all the charges offered to trade votes to get the case resolved. This was done on the blackboard showing how the votes were on each of the counts.

Tr. 6435, 6439.

However, over Mr. Zhuk's objection, the court ruled the following statement from the declaration of Juror No. 5 was *not* admissible:

> Finally, some of the jurors agreed that they would trade a not-guilty vote on the Wolbart matters for a guilty verdict on the murder count.

App. 26a; Tr. 6439, 6443.

After these rulings regarding admissibility, the trial court remarked that it "considered this an issue of 'vote trading' and found it 'particularly worrisome.'" App. 26a. Nevertheless, the court found "this offer and discussion with regard to the trading of votes . . . is not considered misconduct under the law and is . . . therefore . . . not prejudicial." App. 26a-27a.

The California Court of Appeal agreed, finding "[t]he jurors' weighing process, described by [Mr. Zhuk] as vote trading, does not constitute misconduct." App. 30a.

REASONS FOR GRANTING THE PETITION

PREJUDICIAL MISCONDUCT OCCURS WHEN DELIBERATING JURORS IN A MULTI-COUNT CRIMINAL CASE ATTEMPT TO BREAK A DEADLOCK AND ACHIEVE OSTENSIBLE UNANIMITY BY TRADING CONSCIENTIOUSLY HELD VOTES ON VARIOUS COUNTS.

During deliberations in the jury trial of the notorious Hollywood Madam, Heidi Fleiss, *see* http://en.wikipedia.org/wiki/Heidi_Fleiss, jurors were deadlocked on various pandering and drug-trafficking counts. *People v. Fleiss*, No. B093373 (Cal.App. May 28, 1996) (unpublished case). The jurors entered into an agreement to resolve their impasse by bartering votes: In an effort to get jurors who were voting guilty on the drug charges to switch their votes on those charges to not guilty, certain

jurors agreed to surrender their conscientiously held not guilty votes on the pandering charges. The result was a compromise verdict, whereby Ms. Fleiss was convicted on the pandering charges and acquitted on the drug charges. The vote-trading arrangement came to light in post-verdict declarations and juror testimony. App. 83a-99a.[5]

Reversing Ms. Fleiss' pandering convictions in an unpublished opinion, the California Court of Appeal, Second Appellate District, explained:

> That trading votes constitutes prejudicial misconduct is not reasonably open to debate. (*See, e.g., People v. Guzman* (1977) 66 Cal.App.3d 549.) Such malfeasance strikes at the heart of the justice system. All citizens have two opportunities to participate directly in their representative government – voting and jury service. Both are to be taken seriously and engaged in responsibly. The involved jurors in this case took their solemn duty to impartially dispense justice and turned it into advocacy for a cause. All parties in the justice system are entitled to know what the rules of engagement are and should be able to count on those rules being followed. This was supposed to be a trial, not an auction. The jurors involved in this

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[5] The *Fleiss* opinion is included in the appendix to this petition because of the striking similarity between the juror vote-trading arrangement in that case and the juror vote-trading arrangement in this case.

> misconduct committed a transgression worse than those with which Fleiss was charged. Through no fault of the court, the litigants, or their representatives, those jurors turned this serious proceeding into a farce. This verdict resulted not from the evidence, but from extraneous and improper considerations. [¶] . . . Certain members of Fleiss' panel violated their oaths, ignored the evidence, abandoned their duty to seek the truth, and turned deliberations into a bazaar. These jurors did not act as a jury. Fleiss did not truly receive a trial by jury. The guilty verdicts rendered by this panel cannot stand.

App. 98a-99a.

Jurors struck the very same type of vote-bartering arrangement in order to break an impasse during deliberations in Mr. Zhuk's trial. However, as noted above, the California Court of Appeal, Third Appellate District, found the arrangement did not constitute juror misconduct. App. 30a.

The California appellate court in the *Fleiss* case got it right, while the California appellate court in the instant case got it wrong. Juror vote-trading or count-bartering is a serious form of misconduct that undermines the basic due process and jury trial rights of an accused.

This Court has explained that a jury's verdict "must be the verdict of each individual juror," rather than "a mere acquiescence in the conclusion of his

fellows." *Allen v. United States*, 164 U.S. 492, 501 (1896); *accord*, *Arizona v. Washington*, 434 U.S. 474, 509 (1978). Indeed, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it. . . . " *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Accordingly, compromise verdicts are generally condemned. *Stein v. New York*, 346 U.S. 156, 178 (1953); 78B Am.Jur.2d, *Trial*, § 1542, p. 335 (2007) ("Compromise verdicts are invalid."); *but see* C. Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. 157, 177 (2008) (suggesting jurors can come to both valid and invalid compromises).

Compromise verdicts, such as verdicts resulting from vote-trading arrangements, undermine the very purpose of a jury trial. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts . . . [in] draw[ing] the ultimate conclusion of guilt or innocence[,]" *United States v. Gaudin*, 515 U.S. 506, 514 (1995), and "'to follow the law as it is laid down by the court.'" *Sparf v. United States*, 156 U.S. 51, 74 (1895) (quoting *United States v. Battiste*, 2 Sumn. 240, 24 F. Cas. 1042, 1043 (No. 14,545) (CC Mass. 1835) (Story, J., sitting as Circuit Justice)). Jurors flout these core constitutional responsibilities when, instead of conscientiously deliberating, they enter into a pact to resolve differences by swapping votes on various counts.[6] "The Sixth Amendment requires that courts

[6] "The requirement that a jury's verdict must be based upon the evidence developed at trial goes to the fundamental integrity

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not tolerate juror misconduct that results in substantial prejudice to a criminal defendant." 78B Am.Jur.2d, § 1301, p. 75.

Despite these constitutional limitations on the process by which juries may reach decisions, this Court's precedent does, in certain circumstances, insulate from review "compromise in a criminal case whereby some jurors exchange[ ] their convictions on one issue in return for concession by other jurors on another issue." *Stein v. New York*, 346 U.S. at 178 (citing *Hyde v. United States*, 225 U.S. at 381-384).[7] This precedent is attributable to "the near-universal and firmly established common-law rule in the United States [that] flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner v. United States*, 483 U.S. at 117.

However, this common-law rule does not alter the constitutional principle that a verdict must reflect the individual opinion of each juror rather than the surrender of jurors' conscientiously held opinions. Instead, the rule curtails the ability of litigants to adduce evidence of improper methods of arriving at verdicts – e.g., vote-trading. It does so by limiting the

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of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks omitted).

[7] *See Dunn v. United States*, 284 U.S. 390, 394 (1932) ("That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.").

admissibility of post-verdict juror affidavits or testimony.[8]

This common-law rule is not applicable in the instant case. For, when Mr. Zhuk presented the affidavits of two jurors in support of his new trial motion, the prosecutor conceded the admissibility of portions of the affidavits disclosing the jurors' agreement to engage in vote-trading, CT 1694, 1697, and the trial court admitted portions of the affidavits disclosing the vote-trading arrangement. App. 26a-27a; Tr. 6435, 6439. Additionally, the California Court of Appeal addressed the merits of Mr. Zhuk's contention that the vote-trading constituted prejudicial juror misconduct. App. 26a-30a. The admissibility of evidence concerning the jurors' vote-trading

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[8] Even under the regime of the strict rule, courts and legislatures made an exception to allow for admission of evidence that a jury arrived at its decision by chance or lot. *United States v. Marques*, 600 F.2d 742, 746 (CA9 1979) ("a verdict by lot . . . does violence to the basic principle of proving guilt beyond a reasonable doubt"); *People v. Zelver*, 135 Cal.App.2d 226, 236, 287 P.2d 183, 188-189 (1955) (noting "[t]he rule that a juror cannot impeach his own verdict except in the single case of a verdict arrived at by chance or lot"). And, a verdict produced by vote-trading is akin to a verdict decided by lot or chance. 78B Am.Jur.2d, § 1539, p. 332 ("[A] verdict reached by lot or chance, or in any other way than by the exercise of judgment, together with a weighing of the evidence, is so tainted as to be invalid. . . . [A] juror may be said to resort to chance whenever he or she adopts any method of determination the steps and results of which are beyond the juror's calculation and not followed or participated in by his or her understanding, such as, for example, tossing a coin or drawing lots.") (footnotes omitted).

arrangement was compelled by Cal. Evid. Code § 1150(a), which, as the California Supreme Court has explained, "vitiate[d]" the underpinnings of the common-law rule prohibiting jurors from impeaching their verdicts. *People v. Hutchinson*, 71 Cal.2d 342, 349-350, 455 P.2d 132, 136-137, 78 Cal.Rptr. 196, 200-201 (1969).[9]

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[9] Cal. Evid. Code section 1150(a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

The California Supreme Court has characterized Fed. R. Evid. 606(b) as "the federal counterpart to . . . [§] 1150." *People v. Steele*, 27 Cal.4th 1230, 1262, 47 P.3d 225, 246, 120 Cal.Rptr.2d 432, 457 (2002). And, the Ninth Circuit has characterized the rules as "substantively similar[.]" *Estrada v. Scribner*, 512 F.3d 1227, 1237 n. 10 (CA9 2008). However, unlike § 1150(a), the federal rule flatly prohibits post-verdict juror testimony "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict. . . . " Fed. R. Evid. 606(b). Thus, like many state law rules concerning the admissibility of post-verdict juror affidavits or testimony, § 1150(a) actually "differ[s] in important respects from Rule 606(b)." D. Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion Into Jury Deliberations of Religious Principles of Decision*, 74 Tenn. L. Rev. 167, 171 n. 20 (2007); B. Huebner, *Note: Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U.L. Rev. 1469, 1500 (2006). Indeed, while Rule 606(b) "is grounded in the common-law rule against admission of juror

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Thus, the question presented in this case is not whether a defendant in a criminal case is entitled to adduce post-verdict evidence that jurors entered into a vote-trading arrangement or other inappropriate compromise during deliberations,[10] but rather, once such evidence has been admitted, whether it establishes a form of juror misconduct that violates the due process and jury trial rights of the defendant.

A. Courts Are Divided on the Question of Whether Jurors Commit Misconduct When They Agree to Reach Verdicts by Resort to Vote-Trading or Similar Forms of Compromise.

Cases in which this question has arisen have resulted in inconsistent decisions. A sampling of these decisions is presented below. In some cases, courts have allowed verdicts based upon vote-trading or other forms of compromise to stand on the theory that such methods of decision-making do not constitute juror misconduct.[11] In other cases, courts have set

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testimony to impeach a verdict[,]" *Tanner v. United States*, 483 U.S. at 121, § 1150(a) is the part of the nationwide legislative and judicial retreat from the strict common-law rule.

[10] That question has already been resolved in Mr. Zhuk's favor as a matter of California law.

[11] In this line of decisions, courts often blend analysis of the admissibility of evidence of vote-trading with analysis of the effect of such methods on the constitutional rights of litigants in jury trials.

aside or otherwise condemned such verdicts as antithetical to due process and the right to trial by jury.

Review on certiorari is warranted in order to address this fractured body of jurisprudence.

1. Decisions Upholding Jury Verdicts Resulting from Vote-Trading

In *United States v. Straach*, 987 F.2d 232, a jury convicted the defendant on two counts and acquitted him on three counts. *Id.* at 234. After the verdict was delivered, two jurors executed affidavits indicating the jury had "agreed to 'compromise and trade off' . . . guilty verdict[s] on counts two and five in exchange for a verdict of 'not guilty' on count one." *Id.* at 236. In denying the defendant's new trial motion based upon these juror affidavits, the district court acknowledged that while the jury had reached an apparent compromise verdict, there was "no indication that the jury engaged in any unpermitted activity during its deliberative process." *Id.* at 237. The Fifth Circuit affirmed. *Id.* at 241-242.

In *People v. Preston*, 391 N.E.2d 359, a juror made a post-verdict statement "that she . . . agreed to sign a verdict of guilty of murder upon the agreement of other jurors to return a verdict of not guilty of armed robbery." *Id.* at 362. The court "considered the question before it to be whether [the juror's] statement, if uncontroverted, would be sufficient to invalidate the verdict." *Id.* at 365. The court answered the question in the negative, finding that the juror had

not been subjected to any external influence, and applying the common-law rule against impeaching a verdict. *Id.* at 366.

In *United States v. Dye*, 508 F.2d 1226 (CA6 1974), *cert. denied*, 425 U.S. 974 (1975), the court left a verdict intact despite post-conviction evidence that a "juror indicated . . . he had been induced to vote 'guilty' with respect to two defendants that he thought were innocent in order to obtain the votes of other jurors to acquit the [co-]defendants. . . . " *Id.* at 1232. According to the court, "the only influence [the juror] felt was that of the panel's collective reasoning." *Id.*

In *United States v. Johnson*, 495 F.2d 1097 (CA5 1974), a jury found the defendant guilty on two counts and not guilty on eleven counts. *Id.* at 1100. At a hearing on the defendant's new trial motion, two jurors testified the guilty verdicts were the "product of a 'trade out' or compromise" for acquittals on other counts. In denying the new trial motion, the district court found the evidence of compromise did not establish juror misconduct. *Id.* at 1102-1103. The Fifth Circuit affirmed, noting the rule that "[a] jury verdict cannot be impeached by evidence of intrinsic as opposed to extrinsic influences on juror deliberations." *Id.* at 1103.

2. Decisions Condemning Vote-Trading and Similar Forms of Compromise Verdicts

In *People v. Guzman*, 66 Cal.App.3d 549, the court reversed the defendant's conviction due to prejudicial juror misconduct consisting of one juror's "propos[al] that the jury barter an acquittal of" a co-defendant "for the conviction of [the] defendant. . . ." *Id.* at 556, 561. The court characterized the juror's proposal as an "illegal bargain[,]" *id.* at 560, and the State Attorney General conceded that the juror had committed misconduct. *Id.* at 556.

As noted above, the court in the *Fleiss* case cited to *Guzman* in asserting: "That trading votes constitutes prejudicial misconduct is not reasonably open to debate." App. 98a.

In *Vorwerk v. State*, 735 S.W.2d 672 (Tex. Cr. App. 1987), the defendant sought a new trial based on uncontradicted evidence "that one of the jurors, during the guilt/innocence deliberation, traded a vote of guilty for the agreement that the jury would assess a light sentence." *Id.* at 673. The court granted relief, finding jury misconduct had occurred by virtue of an agreement to reach a unanimous guilty verdict "not because of the evidence presented, but because of the promise of light punishment to be meted out by the jury." *Id.* at 674.[12]

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[12] Significantly, the court stated that its resolution of the appeal "hinge[d] upon whether [the] appellant was improperly impeaching the jury's verdict or was, on the other hand, properly

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The Supreme Court of Delaware has explained that "verdicts which result from the surrender by some jurors of their conscientious convictions in return for some like surrender by others . . . are invalid." *Whitfield v. State*, 867 A.2d at 173-174. Similarly, as the Supreme Judicial Court of Massachusetts put it nearly a century ago:

> "[A] verdict which is reached only by the surrender of conscientious convictions upon one material issue by some jurors in return for a relinquishment by others of their like settled opinion upon another issue . . . is a compromise verdict founded on conduct subversive of the soundness of trial by jury."

Simmons v. Fish, 210 Mass. 563, 571, 97 N.E. 102, 106 (1912).[13]

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demonstrating jury misconduct." *Id.* at 674. The court found the appellant was properly demonstrating jury misconduct with evidence of an agreement amongst the jurors to reach a verdict not based upon the evidence and the trial judge's instructions. *Id.*

[13] *Accord*, *State v. Flowers*, 85 Conn.App. 681, 696, 858 A.2d 827, 838 (2004); *rev'd on other grounds*, 278 Conn. 533, 898 A.2d 789 (2006); *Kingsport Utilities, Inc. v. Lamson*, 257 F.2d 553, 559 (CA6 1958); *Goodsell v. Seeley*, 46 Mich. 623, 628, 10 N.W. 44, 46 (1881) ("It is no doubt true that juries often compromise in the way here suggested, and that by 'splitting differences,' they sometimes return verdicts with which the judgment of no one of them is satisfied. But this is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to

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Quotient verdicts in civil cases are analogous to verdicts produced by vote-trading in multi-count criminal cases.[14] And, the courts recognize that jurors who agree to return quotient verdicts have engaged in misconduct which undermines the jury's function. *Shankman v. State*, 184 N.J. 187, 200, 876 A.2d 269, 277 (2005); *Clark v. Foster*, 87 Idaho 134, 139-140, 391 P.2d 853, 855-856 (1964) ("a quotient verdict is one obtained by 'a resort to the determination of chance,' and is invalid"); *Burke v. Magee*, 27 Neb. 156, 158, 42 N.W. 890, 891 (1889) (a quotient verdict "cannot be said to be the judgment of each member of the jury").

> "[I]t is the prior agreement to be bound, when such agreement has the capacity to foreclose all subsequent discussion, deliberation, or dissent among jurors, that is inconsistent with the essential jury function and is, therefore, the core difficulty with an impermissible quotient verdict."

Shankman v. State, 876 A.2d at 277.

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convert it into a lottery. It was no doubt very desirable to the public and to the parties that the jurors should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties; but not otherwise.")

[14] A quotient verdict occurs when there is "a preliminary agreement or understanding among the jurors that each will select a figure as representing his opinion of value or damage and that the sum of said amounts divided by the number of jurors will be accepted by each as his or her verdict, and is in fact so accepted." *Marks v. State Road Dept.*, 69 So.2d 771, 773 (Fla. 1954).

B. Juror Vote-Trading in a Criminal Case Violates the Due Process and Jury Trial Rights of the Accused.

In criminal cases in which evidence of juror vote-trading or count-bartering has been admitted, there can be no doubt but that juror misconduct has occurred and that the defendant's due process and jury trial rights have been violated. Such arrangements amongst jurors necessarily call for individual jurors to surrender their conscientiously held opinions, resulting in verdicts that are not "the verdict[s] of each individual juror. . . . " *Allen v. United States*, 164 U.S. at 501. As the *Fleiss* court explained, a defendant whose fate is determined in such a fashion does "not truly receive a trial by jury." App. 99a. The proceeding is rather more akin to an "auction." App. 98a. Jurors who enter into a vote-trading agreement abdicate their "constitutional responsibility . . . to determine the facts, . . . to apply the law to those facts . . . [in] draw[ing] the ultimate conclusion of guilt or innocence[,]" *United States v. Gaudin*, 515 U.S. at 514; *Turner v. Louisiana*, 379 U.S. at 472-473, and "'to follow the law as it is laid down by the court.'" *Sparf v. United States*, 156 U.S. at 74.

Judicial decisions that vote-trading does not constitute prejudicial misconduct, such as the decision of the California Court of Appeal in this case, cannot be reconciled with the jury trial and due process rights established in the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
Daniil V. Zhuk

January 23, 2009

APPENDICES

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DANIIL VALERIYEVICH ZHUK, Defendant and Appellant.	C047365 (Super.Ct.No. 00F02479) (Filed Jul. 18, 2008)

Seventeen-year-old defendant Daniil Valeriyevich Zhuk, who knew of a Russian gang willing to pay $3,000 to $4,000 for a stolen BMW sedan, participated in the carjacking and fatal shooting of 25-year-old Cindy Chung, driver of a BMW. This was not defendant's only foray into carjacking; a month later he unsuccessfully attempted to steal Karen Wood's Mercedes-Benz sedan. The prosecution also alleged that the night before Chung's murder, Ingrid Wolbart was another victim of an attempted carjacking.

An information charged defendant and a codefendant, Mikhael Pavlovich Vlasov, with murder, attempted carjacking, and robbery in connection with Cindy Chung's death. (Pen. Code, §§ 187, subd. (a),

664, 211, 215, subd (a).)[1] The information also charged defendant with attempted robbery and assault with a firearm against Ingrid Wolbart (§§ 211, 664, 245, subd. (a)(2)) and the attempted carjacking of Karen Wood (§§ 664, 215, subd. (a)).

A jury found defendant guilty of the offenses against Cindy Chung and Karen Wood, but found him not guilty of the offenses against Ingrid Wolbart. The trial court denied defendant's motion for a new trial based on juror misconduct.

Sentenced to life without possibility of parole, defendant appeals, contending: (1) the court erred in denying his new trial motion based upon juror misconduct, (2) instructional error, (3) the court erred in allowing Vlasov's trial counsel to elicit testimony regarding defendant's exercise of his right to counsel, (4) the court erred in refusing defendant's request to have Vlasov present during Wolbart's testimony, (5) the court allowed prejudicial character evidence, (6) insufficient evidence supports the finding that defendant was a major participant in the underlying felonies, (7) the felony-murder rule is unconstitutional when applied to juvenile nonkillers, (8) defendant's sentence violates his Sixth Amendment rights, (9) defendant's sentence constitutes cruel and unusual punishment, and (10) cumulative error. We shall affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

An information against defendant and codefendant Mikhael Vlasov alleged the duo murdered Cindy Chung. (§ 187, subd. (a).) Two special circumstances were also alleged: the murder was committed during the commission of an attempted robbery and an attempted carjacking. (§ 190.2, subd. (a)(17)(A), (L).) Counts two and three charged the pair with the attempted carjacking and robbery of Cindy Chung. (§§ 664, 211, 215, subd. (a).) Count four charged Vlasov with assault with a firearm on Han Chung, Cindy Chung's father. (§ 245, subd. (a)(2).) Counts five and six charged defendant with attempted robbery and assault with a firearm, with weapons enhancements, against Ingrid Wolbart. (§§ 211, 664, 245, subd. (a)(2).) Count seven charged defendant with the attempted carjacking of Karen Wood. (§§ 664, 215, subd. (a).)

A jury trial followed.[2] Summarized below is the evidence received regarding the crimes against the three victims.

Cindy Chung – Murder, Attempted Robbery, and Attempted Carjacking

Late in the afternoon of January 20, 2000, Cindy Chung drove to the auto body shop owned by her

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[2] Vlasov's case was tried with defendant to a separate jury after severance motions were denied.

father, Han Chung, to help him deliver a car.[3] Cindy drove her BMW from downtown Sacramento west on Highway 50 to Rancho Cordova, where the family business was located. Cindy was to follow Han as he delivered a customer's car.

Unbeknownst to Cindy, her BMW had been spotted on the freeway and followed by defendant's car. Defendant drove with Vlasov and 14-year-old Peter P. as passengers. Defendant carried a loaded .22-caliber handgun in his jacket. Defendant told Vlasov and Peter P. that he knew people who would pay $3,000 to $4,000 for a BMW or a Mercedes. Defendant discussed ordering drivers out of the desired cars at gunpoint.

Defendant told his passengers that Cindy's car was new and people would pay good money for it. Defendant suggested that if they got the car, the trio would split the money. Peter P. said it was a bad idea, but Vlasov agreed with defendant.

Defendant followed Cindy after she left the freeway, until she parked at the family's auto body shop. Parking nearby, defendant pulled the gun from his jacket and gave it to Vlasov. Defendant instructed Vlasov to run up to the driver of the car, stick the gun in her face, and take away the car. Peter P. heard

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[3] For clarity's sake, we will refer to the Chungs by their first names.

Vlasov check the gun's clip and watched him leave the car.

Cindy parked by her father's office. About 10 minutes after going into the office, Cindy returned to her car as her father locked the office door.

While Cindy helped her father, Vlasov returned to the car and told defendant he could not find the BMW. Defendant told Vlasov to go check again, and Vlasov walked away toward the shop.

After locking the office, Han walked to the customer's car he was to deliver. Vlasov passed Han and asked for a cigarette. After Han said he didn't have any, Vlasov walked past him and around the corner toward where Cindy was parked. Almost immediately Han heard two gunshots and saw Vlasov run past him. Vlasov shot at Han as he ran. Han saw Cindy's car smash into a fence and called 911.

In defendant's car, Peter P. heard the gunshots. Vlasov ran to the car, got in, and said he had shot out the front windshield of the BMW. After the incident, defendant drove around surface streets. Peter P. took out the gun and fired it. He had seen defendant's gun two or three times before, once when defendant showed it to a group of people at a McDonald's restaurant.

Defendant told his passengers he would dispose of his car by getting into an accident. He would then collect the insurance money. Defendant rear-ended a car on Florin Road, and Peter P. and Vlasov went to

the hospital. An officer took a report on the accident at around 11:30 the night of Cindy's murder.

When officers arrived at the murder scene, one of them broke the BMW's driver's side window in order to aid Cindy. Cindy, however, was dead. A .22-caliber bullet had gone through the driver's window, under her arm, through her lung, and into her heart, causing her death.

Officers found six shell casings at the scene. Two cartridges were found approximately 75 feet from the front of the BMW.

The owner of a nearby shop, Brian Tanner, saw a man jogging toward the Chung body shop on the afternoon of the murder. Tanner saw a car slowly roll up in front of his shop and then pull out onto the street. The jogger came back and got into the car. Suspicious, Tanner got into his car and followed. The car made a very fast U-turn and parked in front of another business, which was closed. Tanner parked nearby to keep an eye on the car, which suddenly sped past. Tanner caught up with the car, which was on his right. He looked over and stared face to face with the driver. Frightened, Tanner drove away. Tanner called police after reading the next morning about Cindy's murder. He met with police and provided information to create a sketch of the driver, which was published in newspapers, including a Russian language newspaper.

Around the time of the shooting, defendant told a friend from school, Darya Grozovskay, that he stole

cars, which were subsequently sent to San Francisco. Grozovskay told defendant he would get into trouble, but defendant told her he was a professional. Defendant showed her his gun and said he wanted to scare people. Grozovskay told defendant his life was going "down to the gutter."

The day after Cindy's murder, defendant called Grozovskay. Defendant told her that he had gone to steal a car, but there was a woman who did not want to get out of the vehicle and she ended up dead.

A month after the murder, defendant's father, Valeriy Zhuk, received a gun from Petro Zaychenko.[4] Valeriy gave the gun to a friend, Bill Wilson. Wilson then asked his son, a police officer, to check the serial number to see if the gun had been stolen. Wilson put the gun in his desk drawer. On March 20, 2000, Valeriy saw a sketch of the suspect in the Russian newspaper coverage of Cindy's murder. The picture looked like defendant. Valeriy angrily confronted defendant, and the two talked most of the night.

The following day Wilson, accompanied by Valeriy and defendant, turned the gun in to officers at juvenile hall. Wilson told officers that Valeriy had given him the gun two to three months earlier.

Valeriy told Wilson on March 20, 2000, two months after the murder, that the gun had been

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[4] To avoid confusion, we will refer to Valeriy Zhuk by his first name.

involved in a crime. Defendant told Wilson he had stolen some cars and delivered them to Vallejo to be sold to a Russian man. Defendant used the money to buy marijuana.

At juvenile hall, Wilson sat in on the interview between Valeriy and detectives. The jury was provided a transcript of the interview. During the interview, Valeriy mentioned defendant's idea of stealing cars for money. However, at trial Valeriy was more equivocal, contending the interview interpreter erred in relaying his statements. Valeriy also claimed Vlasov was the instigator of Cindy's shooting.

Microscopic comparisons showed the casings found at the scene had been fired from the gun Valeriy gave to Wilson. The bullets removed from Cindy's heart had the same rifling characteristics, but the quality of the markings was not sufficient to connect it with the gun.

Ingrid Wolbart Attempted Robbery and Assault With a Firearm

The night before Cindy's murder, Ingrid Wolbart loaded groceries into her Mercedes S320 sedan outside a market. As Wolbart was returning the shopping cart, a young man dressed in dark clothing came out of the darkness. He asked Wolbart for a cigarette, and she detected a Russian accent.

Wolbart lectured the young man on the evils of smoking as he continued to approach her. He told

Wolbart: "Give me your money." Wolbart responded: "[A]ny young man should work for his money." He held open the door of Wolbart's car and told her: "Then I have to hurt you." He then pulled out a gun. Wolbart was scared but said, "[W]ell, you just try that." Wolbart's tone led the young man to take flight. Wolbart looked her assailant in the face during the interchange. He looked young. Wolbart identified defendant in court.

After learning of Cindy's murder, Wolbart notified police of the incident. In March 2000 Wolbart looked at a photographic lineup. She picked out defendant's photo immediately and was definite about her identification. In a second photo lineup, Wolbart selected Vlasov's photo, stating it was "close in looks to the guy, but he's not as good as the other one." On a scale of one to ten, Wolbart ranked the possibility of Vlasov as the assailant at a five or six.

At trial, Wolbart stated that defendant was the person who attempted to rob her. She described her assailant's jacket as dark, large, and bulky. She estimated the robber's height as five feet six inches. Wolbart stands five feet three inches and she looked him right in the eye. She described her assailant to officers as short and sturdy. At trial, she described him as "wide" or having "wide shoulders." Wolbart clipped defendant's photograph from a newspaper and kept a folder containing items related to the case.

Karen Wood – Attempted Carjacking

On February 23, 2000, Karen Wood got into her Mercedes S500 after a doctor's appointment. As she put her key into the ignition, a young man opened her car door. He leaned in and asked her for a cigarette. Wood said, "Excuse me[?]" and the man told her, "Get out of your car." He said: "I have a gun. I'll shoot you. Get out of your car." Wood never saw the gun.

Wood got out of the car, taking her key. The man said, "I want your car." Wood responded, "What do you mean you want my car[?]" He replied, "I need your car." When Wood refused, he again said, "I need your car." Wood offered to drive the man "wherever you need to go" as she slowly walked toward the back of the car. The man got into the driver's seat and yelled to Wood to give him the keys. Wood opened the car trunk to cover her escape and fled. As Wood glanced behind her, she saw the man run out of the parking lot.

Wood had noted a scar on the man's forehead. She described her assailant as a white male, approximately five feet eight inches to five feet nine inches tall, between the ages of 17 and 20, with blond hair, blue eyes, and a Russian accent.

At a photo lineup Wood immediately identified defendant as the attempted carjacker. She was 100 percent sure of her identification. Wood noted: "The scar on the forehead, the hair was longer and blond. . . . It was four in the afternoon and I was two feet away."

In court, Wood identified defendant after asking him to lift up the hair from his forehead and also looking at Vlasov at the counsel table. A fingerprint from the driver's side door of Wood's car matched defendant's print.

Defense Case

Defendant admitted he attempted to steal Karen Wood's car but denied the attempted carjacking of Ingrid Wolbart and claimed Vlasov was responsible for Cindy Chung's death.

Ingrid Wolbart

Defendant argued Wolbart mistakenly identified him as her assailant, and he also provided an alibi for the evening in question.

Wolbart described her assailant as a white man approximately five feet six inches tall with a small build. Defendant was six feet tall and between 150 and 155 pounds when taken into custody. Defendant is five inches taller than Vlasov. Defendant testified he sold his gun to Vlasov on the afternoon of January 19, 2000, the day of the attempted carjacking of Wolbart.

Defendant provided alibi evidence through his testimony and that of his aunt, Lyubov Shutkova, and her daughter Svetlana. According to all three, defendant on the evening in question arrived at his aunt's house, then picked up his cousin at her workplace.

Defendant then accompanied Shutkova to an apartment where his aunt confronted a man about his relationship with 17-year-old Svetlana. The pair returned home around one in the morning on January 20, 2000.

While defendant and his aunt confronted the man Svetlana was seeing, Svetlana ran away and was subsequently reported missing. An officer testified to receiving a call about a missing juvenile at 11:12 p.m. on January 19, 2000. Defendant made the call from a gas station. The parties stipulated that defendant made the call about Svetlana and that she had been located and taken home a little after 1:00 a.m. on January 20, 2000. Defendant's testimony corroborated Svetlana's and Shutkova's versions of events.

Defendant testified Vlasov told him about an incident similar to Wolbart's version of events. Vlasov talked about the incident after Cindy Chung's murder.

Cindy Chung

Defendant presented testimony by a Russian interpreter who reviewed the taped interview of Valeriy by Deputy Osadchik. The interpreter pointed out various interruptions, misinterpretations, and omissions of Valeriy's words during the interview. The interpreter prepared her own transcript of the interview. In the interpreter's version, Valeriy told officers that defendant told him Vlasov said "I'm going to

take [the] car from her" and that Vlasov "took the gun and ran over there."

Defendant testified he sold the gun to Vlasov the day before Cindy's murder. He bought the gun and ammunition in January 2000. Defendant's friend, Artem Gidenko, testified he saw defendant give Vlasov a gun in a fast food parking lot on the afternoon of the murder. Gidenko had previously been convicted of felony evasion and visited defendant in jail several times.

As to Cindy's murder, defendant testified that on the afternoon of the murder he was en route to meet someone who was holding a car stereo defendant had purchased. Defendant accompanied Vlasov to the Chungs' business at Vlasov's request. Defendant denied spotting Cindy's BMW until the car exited Highway 50. Defendant noticed a Chinese girl inside the car.

According to defendant, his car was incapable of driving in reverse and he had to make U-turns instead.

On the afternoon of the murder, defendant did not question Vlasov about their destination. Defendant stated Peter P. left the car with Vlasov. Defendant did not know Vlasov was carrying the gun he had sold him.

Defendant did not learn Vlasov shot at the BMW until later that night as they went to a park to buy marijuana. Peter P. put the gun in a plastic bag and

hid it in the bushes. Defendant later denied going to the park a second time that night and testified that Vlasov told him about the murder the next day. Defendant did not believe Vlasov.

Defendant admitted rear-ending a woman after leaving the park the night of the murder, but denied any discussion with Vlasov or Peter P. before the accident occurred about having an accident or about insurance.

Defendant also admitted he was involved with a group of Ukrainians and Russians who stole cars, car stereos, and tire rims. Defendant and Vlasov broke into cars together to steal stereos and shared the proceeds. Defendant told his father about stealing cars by using a screwdriver and "altering [the] ignition." Vlasov told defendant about car buyers from the Russian Mafia who promised large sums for a BMW or Mercedes-Benz. According to defendant, Vlasov did not tell him about this until the day after the murder.

On numerous occasions in 1999, defendant broke into cars to steal stereos, selling them to Norteño gang members. Nicolai Zaychenko stole stereos with defendant. Although defendant rode in stolen cars and drove them short distances to strip them, he never started [sic] a car himself.

In February 2000, after Cindy's murder, defendant and Vlasov traveled to Reno. They broke into cars and stole stereo components.

Defendant admitted telling Darya Grozovskay that he had been involved in a murder in which "they" had "tried to take the car" and "[t]he lady wouldn't give it to them and they killed her." He testified he told this to Grozovskay to impress her.

Defendant admitted misaddressing a letter from jail with a return address to Vlasov in jail. This sent a message to Vlasov not to talk about the case.

Karen Wood

Defendant admitted the attempted carjacking of Karen Wood's vehicle but stated he was unarmed at the time. Defendant chose Wood's Mercedes-Benz because it could be sold for $3,000. After stealing Wood's car, defendant intended to contact Vlasov to get the phone number of the men who would meet him and drive the car to San Francisco for eventual shipment to Russia or China.

Other Evidence

Amado Lopez testified about an attempted carjacking outside a grocery store around midnight on January 29, 2000. Two men walked up to his car, knocked on the car window, and ordered him, at gunpoint, out of the vehicle. The pair took his car key, cell phone, and wallet and ordered Lopez into the back seat. After the men failed to get the car to start, they ordered Lopez into the front seat. Lopez got out of the car and fled. After Lopez ran away, the men

fired the gun and ran to a waiting car. Lopez thought one man looked Hispanic and the other Asian.

Defendant admitted he and Vlasov went to the grocery store parking lot that night. They parked near the entrance. Defendant was surprised to hear gunfire and saw Vlasov shoot into the air. Defendant denied he intended to steal a car. He had not seen the gun between the time Peter P. hid it in some bushes at the park on January 20, 2000, and the night of January 29, 2000. The next time defendant saw the gun was when Bill Wilson brought it to juvenile hall.

Vlasov's Evidence

Vlasov presented testimony by Peter Zaychenko, whose son gave him a gun on February 1, 2000. His son had run away with defendant, whom Zaychenko did not approve of. Defendant called and demanded the gun be returned, threatening Zaychenko with "problems" if it was not. Zaychenko told defendant's father about the gun, and Valeriy retrieved it.

Vlasov admitted shooting Cindy but testified the murder was an accident instigated by defendant. Defendant saw Cindy's BMW on the freeway and told Vlasov and Peter P. that he knew members of the Russian Mafia who would pay between $3,000 and $4,000 for the car. The trio began to follow the BMW.

As Cindy reached her family's auto body shop, defendant gave Vlasov the gun and told him to get the car. After walking away to look for the car, Vlasov

returned and told defendant he could not find it. Defendant told Vlasov, "I['ll] kick you in the head." Defendant also told Vlasov he was a "pederast" and a "condom" if he failed to get the car.

Vlasov did not know if the gun was loaded. He saw an Asian man and asked him for a cigarette. Vlasov saw the BMW and walked within three feet of it. Vlasov did not know when he took the gun out of his jacket and did not intend to shoot. Vlasov ran back to defendant's car, telling defendant he had shot into the steering wheel of the BMW.

Vlasov admitted the attempted carjacking of Lopez, which occurred nine days after Cindy's murder. Vlasov testified defendant ordered the carjacking. Vlasov denied any involvement in the Wolbart attempted carjacking.

Vlasov helped defendant steal car stereos in California and Nevada. Defendant told him he knew someone in the Russian Mafia who would buy cars from them. Defendant got the gun used in Cindy's murder and took Vlasov to a riverbank to shoot it. Defendant showed Vlasov how to load the gun but did not let Vlasov load it.

The Aftermath

The jury found defendant guilty of murder and found both special circumstance allegations and the arming allegation to be true. The jury also found defendant guilty of attempted carjacking and attempted

robbery charges against Cindy and found true the arming allegations. In addition, the jury found defendant guilty of the attempted carjacking against Wood. The jury found defendant not guilty of the charges as to Wolbart.

Following the trial, defendant filed a motion requesting that the court exercise its discretion under section 190.5, subdivision (b) and sentence him to 25 years to life rather than life without the possibility of parole. Defendant also filed a motion for a new trial based on juror misconduct.

The court denied defendant's motion for a new trial. The court sentenced defendant to life without possibility of parole plus one year based on his murder conviction and the jury's findings as to the special circumstances. The court stayed defendant's sentence on the attempted robbery and attempted carjacking of Cindy Chung pursuant to section 654, and imposed a consecutive term of two years six months plus one year for the attempted carjacking of Wood. Defendant filed a timely notice of appeal.

DISCUSSION

I. New Trial Motion Based on Juror Misconduct

Defendant argues the trial court erred in denying his new trial motion based on juror misconduct. According to defendant, the juror affidavits in support

of the motion revealed three sources of juror misconduct: the jurors engaged in vote trading, one juror held herself out as a legal expert and provided legal advice, and the jurors discussed convicting defendant to send a message to the Vlasov jury.

A. Background

Defendant filed a motion for a new trial pursuant to section 1181, circumstances 2 and 4, alleging the jury received evidence out of court, the jury was guilty of misconduct preventing fair consideration of the case, and the verdict was decided by a means other than a fair expression of opinion on the part of all jurors.

Defendant presented declarations by two jurors: Juror No. 3 and Juror No. 5. Since defendant's allegations of misconduct are based exclusively upon these declarations and are quite detailed, we present the declarations in full.

1. Declaration of Juror No. 3

Juror No. 3's declaration states: "I was one of the jurors in the Daniil Zhuk case and was seated in the #3 position.

"As the jury deliberations progressed, at least five to six of the jurors, including myself, had voted that Daniil Zhuk was not guilty of the murder charge. A question was then sent to the judge asking if it was permitted for us to find Daniil not-guilty of murder,

but guilty of the remaining charges regarding the Cindy Chung matter.

"While the response of the Court to that question was 'yes,' there was also a statement that we should look at certain other jury instructions that had been given us. This was interpreted by some as an instruction by the judge to find Daniil Zhuk guilty of murder.

"One of the other jurors had been employed for a long time as a secretary for a legal firm. Because of her work, she said that she had special legal expertise and knew the law. Because of that, and the judge's response to our inquiry, she told us that we had to find Daniil Zhuk guilty of the murder charge.

"We were told repeatedly that we could not find Daniil guilty on the attempted carjacking and attempted robbery charges, Counts two and three, and find him not-guilty on the murder charge, Count one. The verdict on all of the three counts had to be the same. She said that we could not change the law, the law is as it is, we cannot analyze the law, and we have to find Mr. Zhuk guilty of murder.

"This juror also told us that she had a cousin who was murdered with a handgun similar to that used in the Chung shooting. She went into detail describing the facts of her cousin's killing. She compared those facts with those of the Zhuk case and equated the murder of her cousin to this case. She told us that because these cases had similar facts and circumstances, because of the judge's answer to our question,

and due to her legal expertise, we must find Daniil Zhuk guilty of murder.

"This same juror, and others, said that the judge would not like a 'hung jury.' It was discussed that with a hung jury, Daniil Zhuk could possibly receive a worse sentence if he were tried later by another jury than if we just found him guilty of the murder. These jurors were also added [*sic*] that they did not want the Chung family to have to go through another trial. We had to reach a verdict to give the family closure.

"There was a group of jurors who were voting guilty on all of the charges. They agreed to change their votes on the two counts concerning Ms. Wolbart if we would change our votes to guilty on the murder charge.

"Although we were not the jury for Mr. Vlasov, we heard testimony concerning his role in the young lady's death and were convinced that he had shot and killed Ms. Chung. Although I was still certain that Mr. Zhuk was not guilty of the murder charge, but as we were convinced of Vlasov's guilt, we wanted to send a message to the other jury to convict him. Because of that, of the pressure put on us by the legal expert, of the agreement to vote not-guilty on the Wolbart matter, others and myself who had previously voted not guilty on the Daniil Zhuk murder charge changed our votes to guilty to make sure that Mr. Vlasov would be found guilty of this murder.

"Lastly, it was known that one juror feared that if the jury deliberations continued any longer, she

would lose her job. Others talked of having vacations awaiting them and wanted the deliberations to wrap up."

2. Declaration of Juror No. 5

Juror No. 5's declaration states: "I was a juror in the Daniil Zhuk trial and was in the #5 seat.

"After the start of our jury discussions four or five of us jurors had voted that Daniil Zhuk was not guilty of murder. As the jury was not agreeing on this charge, a question was sent to the judge asking if it was alright to find Daniil not-guilty of murder, but guilty of two of the remaining charges. These were the first three counts.

"The judge answered 'yes,' to the question, but also said that we should look at some of the other jury instructions which were put in his reply.

"From the judge's reply, I felt that I could still find Daniil not-guilty of the murder. One of the jurors, . . . who was juror #6, had told us that she worked for an attorney for many years. She said that she knew the law and because of how the judge had replied to the question sent him, we had to find Daniil Zhuk guilty of murder. She said it was a legal impossibility to find Daniil guilty of the two charges and not guilty of the murder. She said that 'the law is the law, I've been in juries before, and I know all about the law.'

"At this time, there were at least five of us who were voting guilty on the attempted car-jacking and attempted robbery counts, but not guilty on the murder charge. The rest of the jury, led by Juror #6, said that we could not do that.

"Juror #6 also told all of us about one of her relatives, a cousin, who had also been murdered. She talked about how her cousin died, going into detail in comparing the facts of her cousin's murder with those of the Korean girl in this case. The shootings were very similar including involving a car [and] the type of gun used. Because they were so similar, and because she was this legal expert, she told us that we had to find Daniil guilty.

"We also discussed the fact that Mr. Vlasov had killed the young lady and needed to be found guilty of her murder. We also talked about how if our jury could not come to a verdict on the Zhuk case because some of us were voting not-guilty, it was possible that Daniil would be worse off if another jury found him guilty.

"Some of the jurors were complaining how things were taking too long. Although some were worried about their vacations, several of us did not want the deliberations to end for that reason. However, we kept hearing time after time how others just wanted to wrap things up and leave.

"Because there were a number of us who were voting not-guilty on the murder charge, others who were voting guilty on all of the charges offered to

trade votes to get the case resolved. This was done on the blackboard showing how the votes were on each of the counts. Finally, some of the jurors agreed that they would trade a not-guilty vote on the Wolbart matters for a guilty verdict on the murder count.

"At the end we talked about sending a message to the Vlasov jury to make sure that he was found guilty of the murder. The only way that we could make sure that Mr. Vlasov would be held responsible for the killing was by finding Daniil Zhuk guilty. Although I felt that he was not guilty, to send that statement to the other jurors and make sure that Vlasov was convicted, I changed my vote to find Daniil Zhuk guilty of the murder charge."

Following a hearing, the court denied defendant's new trial motion.

B. Analysis

As the trial court properly discerned, when a defendant moves for a new trial based on jury misconduct, the trial court undertakes a three-part inquiry. First, the court must consider whether the evidence presented for its consideration is admissible. It must then consider whether the facts establish misconduct. Finally, if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial. (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 475 (*Sanchez*).)

In making the determination as to the admissibility of the evidence presented, including declarations of jurors, the trial court must take great care not to overstep the boundaries established by Evidence Code section 1150, which proscribes [sic] the scope of evidence admissible to test a verdict. Section 1150 permits evidence from jurors regarding overt acts, that is, such statements, conduct, conditions, or events that are open to sight, hearing, and the other senses and therefore subject to corroboration. However, jurors may not testify to the subjective reasoning processes of the individual juror. Section 1150 may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by other jurors in the course of their deliberations that reflect the mental processes of the jurors. (*Sanchez, supra,* 62 Cal.App.4th at pp. 475-476.)[5] A statement giving reasons for the juror's vote is a verbal reflection of the juror's mental processes. (*Ibid.*)

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[5] Section 1150 provides: "(a) Upon inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

1. Vote Trading

Defendant contends that in failing to find the jurors committed misconduct by vote trading, the trial court misapplied Evidence Code section 1150 and relied upon outdated and unpublished case law. The People contend the jury merely deliberated the relative strengths and weaknesses of the various charges in the process of reaching a verdict.

The declarations of Juror No. 3 and Juror No. 5 state that during deliberations the jury deadlocked on the murder charge and the charges involving Ingrid Wolbart. Some jurors wanted guilty verdicts on all counts; other jurors wanted a not guilty verdict on the murder count. The jurors discussed the possibility of the jurors who wanted a not guilty murder verdict agreeing to vote guilty in exchange for a not guilty vote on the Wolbart counts.

The trial court considered this an issue of "vote trading" and found it "particularly worrisome." The court found inadmissible Juror No. 5's statement that "Finally, some of the jurors agreed that they would trade a not-guilty vote on the Wolbart matters for a guilty verdict on the murder count."

Nonetheless, the court addressed the question of whether the mention of vote trading constituted misconduct. The court noted that "frequently juries reach verdicts by way of compromise." After reviewing case law, the court observed: "I believe the law here is as I stated it, that this offer and discussion with regard to the trading of votes is not the type of

misconduct or is not considered misconduct under the law and is [*sic*] therefore would not be prejudicial."

According to the trial court, Juror No. 3's verdict was not "a tit for [tat] kind of situation" because "there were other extrinsic factors at work and other elements to her decision." In addition, even if Juror No. 5's statements on the trading of votes were misconduct, "it was only a factor that apparently was at work in the mind of one of these jurors . . . along with . . . other multiple factors."

Defendant claims the trial court based its ruling on outdated cases: *People v. Blau* (1956) 140 Cal.App.2d 193 (*Blau*) and *People v. Root* (1952) 112 Cal.App.2d 122 (*Root*). Defendant claims, without citation to authority, that these cases are no longer good law.

In *Blau* and *Root,* courts denied new trial motions based on juror misconduct. In *Blau,* a juror affidavit stated some of the jurors had been inclined to vote in favor of the defendant's guilt, but voted for his acquittal when other jurors agreed to vote him guilty of a lesser offense. (*Blau, supra,* 140 Cal.App.2d at p. 217.) The appellate court upheld the denial of the defendant's new trial motion, concluding: "Jurors may not impeach their verdict by affidavit that it was the result of compromise, or for other irregularity other than that it was arrived at by chance." (*Ibid.*) In *Root,* the defendant submitted affidavits by jurors stating those voting not guilty were persuaded by the foreman to change their votes

to guilty on one count, while jurors voting guilty changed their votes to not guilty on the other three counts. (*Root, supra,* 112 Cal.App.2d at pp. 126-127.) The defendant conceded that "the verdict could not be impeached by the jurors in this fashion." (*Id.* at p. 127.)

Defendant appears to find these cases "outdated" because they predate the enactment of Evidence Code section 1150. However, nothing in the text of section 1150 invalidates or casts aspersions on *Blau* or *Root.* Instead, section 1150 restricts the circumstances under which jurors may impeach a verdict. The comment to section 1150 states that the section permits evidence of misconduct by a trial juror to be admitted, but "forbids the reception of evidence as to the effect of such misconduct on the minds of the jurors." (Assem. Com. on Judiciary com., 29B pt. 3 West's Ann. Evid. Code (1995 ed.) foll. § 1150, p. 502.) The comment also notes that the section "makes no change in the rules concerning when testimony or affidavits of jurors may be received to impeach or support a verdict. Under existing law, a juror is incompetent to give evidence as to matters that might impeach his verdict." (*Ibid.*)

Other cases predating Evidence Code section 1150 reject challenges similar to that posed by defendant in the present case. In *People v. Decker* (1954) 122 Cal.App.2d 447, the appellate court upheld the denial of a new trial based on juror affidavits alleging vote switching among the counts. The court noted: "There is nothing in the record to indicate that this

question was answered in the affirmative or the negative and nothing to indicate that the jurors agreed to vote in accordance with the suggestion, if it was a suggestion. . . . The record does not support appellants' contention that the verdicts were decided by lot and by means other than the fair expression of opinion on the part of the jurors." (*Id.* at p. 451.)

A similar result was reached in *People v. Sherman* (1950) 97 Cal.App.2d 245, where the defendant presented an affidavit suggesting the jurors participated in vote switching. The appellate court affirmed the trial court's denial of the new trial motion, rejecting the defendant's attempt to challenge the general rule that a juror may not impeach his or her own verdict by characterizing the vote switching as verdict by lot or chance. (*Id.* at pp 256-257.)

Defendant argues that in *People v. Guzman* (1977) 66 Cal.App.3d 549, the appellate court denounced vote switching as misconduct. In *Guzman,* a rogue juror attempted to barter his vote. Although other jurors immediately complained to the trial judge, the rogue juror was allowed to remain impaneled. He proceeded to harangue and taunt his fellow jurors for two more days before he was discharged. Under the circumstances, the People conceded the juror's conduct in proposing that the jury barter an acquittal of a codefendant for the defendant's conviction constituted misconduct, and the appellate court reversed the trial court's denial of the defendant's new trial motion. (*Id.* at pp. 552-556, 560-561.)

Although defendant attempts to cast the *Guzman* court's decision as a blanket condemnation of vote switching as automatic misconduct, in *Guzman* the jury complained of the conduct immediately and the court mishandled the investigation. The appellate court did not find, based on juror affidavits after the verdict, that vote bartering or switching automatically constitutes misconduct.

Defendant maintains that "the jury in this case treated the deliberative process in the trial like a bad game of pin the tail on the donkey – blindly tacking their votes to the verdict forms." We disagree.

As the People point out, in the very contentious atmosphere of jury deliberations, the jury can be expected to measure the relative strengths and weaknesses of the charged counts in the process of arriving at a verdict. Here, defendant faced a felony murder charge, a serious charge that would naturally trouble the jury. Strong evidence supported the charge, with defendant's hatching the carjacking plot and supplying Vlasov with the gun. In contrast, the evidence in support of the Wolbart counts was less compelling given that her physical description of her assailant was physically incompatible with defendant. The jurors' weighing process, described by defendant as vote trading, does not constitute misconduct.

2. Injection of Legal Expertise

Defendant also contends Juror No. 6 committed misconduct by injecting her legal expertise into the deliberations. During deliberations, the jury asked the court if it could find defendant guilty of the attempted carjacking and attempted robbery, but not guilty of Cindy's murder. The court responded in the affirmative and directed the jury's attention to the instructions on felony murder.

Based on the court's response, Juror No. 6 told her fellow jurors she possessed "special legal expertise," and her expert opinion was that the court's response compelled a guilty verdict on the murder charge. Defendant labels these comments prejudicial misconduct.

It is not improper for a juror, regardless of educational or vocational background, to express an opinion on a technical subject as long as the opinion is based on the evidence at trial. Life experience necessarily informs jurors' views of the evidence. However, a juror should not discuss an opinion explicitly based on specialized information obtained from outside sources. An injection of external information in the form of a juror's claim of expertise or specialized knowledge constitutes misconduct. (*People v. Steele* (2003) 27 Cal.4th 1230, 1265 (*Steele*).)

Defendant contends Juror No. 6's assertion that she had special legal expertise which taught her the jury had to find defendant guilty of murder because he was guilty of the underlying felonies constituted

an assertion of information drawn from her own professional knowledge. This injection of outside expertise constituted misconduct.

The trial court found the juror's statements about her legal background and her experience with another, similar crime did not constitute misconduct. The court ruled the statements admissible but concluded the evidence did not establish misconduct. The court was not persuaded Juror No. 6 provided "extraneous or erroneous legal advice." The court reasoned: "When the jury argues a matter as this jury was doing, they incorporate both their assessment of the facts and apply those facts to the law. The Court, in answering the question, properly identifies what the law is, based on factual determinations that this or any one of the jurors could make, it would be legally impossible to find Mr. Zhuk guilty of Count 2 and 3 and not find him guilty of murder. It would be a correct and proper argument to make. Indeed, when I get to the issue of prejudice, I think the entirety of the record would compel an objective jury to reach that conclusion, although that is not controlling. So we have a person who says she works for an attorney, makes this statement with regards to the law. . . ."

The court then considered whether Juror No. 6's conduct, if it constituted misconduct, was prejudicial. Prejudice is presumed where there is misconduct. This presumption can be rebutted by a showing that no prejudice actually occurred or by an examination of the entire record by the reviewing court to determine whether there is a reasonable probability of

actual harm to the defendant. Among the factors to be considered when determining whether the presumption of prejudice has been rebutted are the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued. (*People v. Loot* (1998) 63 Cal.App.4th 694, 697-698.)

In considering the impact of the juror's assertion of legal expertise, the court noted it had responded to the jury's question regarding the possibility of finding defendant not guilty of murder, but guilty of attempted robbery and carjacking. The court responded that the jury could arrive at such a verdict: "It was a response consistent with the law and did not imbue itself with any factual determination one way or the other, that being within the province of the jury, but directed them to review the relevant law with regard to felony murder."

The court then considered Juror No. 6's subsequent comments: "The lady, consistent with these [juror] declarations, could very well argue that if there was, and the weight of the evidence, I believe would so support, a robbery within or attempted robbery within and a murder within the course of that robbery, that the felony-murder rule applied and that they were compelled, even though they clearly did not want to, to return a verdict of guilty on Count 1. And when you look at it in that context and with an objective person standard as *Carpenter* and these other cases require, this does not rise to the level of prejudicial conduct, assuming it is misconduct, such as to necessitate a new trial." [(Italics added.)]

We agree with the court's assessment of the admissibility of the jurors' declarations concerning the injection of legal expertise into the deliberations. However, we find the question of whether Juror No. 6's comments constituted misconduct more problematic.

Here, the trial court directly and unequivocally answered the jury's question regarding the propriety of finding defendant guilty of the underlying offenses but not guilty of felony murder. The trial court in no uncertain terms told the jury it could do so. Notwithstanding the trial court's answer, Juror No. 6 contradicted the court, arguing her legal knowledge compelled a different result. Juror No. 6 claimed her work as a long-time legal secretary gave her a special expertise and knowledge of the law.

We believe Juror No. 6's comments amount to an injection of external information in the form of a claim of expertise or specialized knowledge which constitutes misconduct. (*Steele, supra,* 27 Cal.4th at p. 1265.) In *In re Stankewitz* (1985) 40 Cal.3d 391 (*Stankewitz*), the Supreme Court found misconduct when a juror touted his 20 years' experience as a police officer during deliberations. The juror stated that as a police officer he knew the law and proceeded to make completely erroneous statements about the elements of robbery. (*Id.* at p. 396.) The court found the juror contradicted the court's correct robbery instruction and injected his own outside experience as a police officer on a question of law. The Supreme Court observed: "Worse, the legal advice he gave

himself was totally wrong. Had he merely kept his erroneous advice to himself, his conduct might be the type of subjective reasoning that is immaterial for purposes of impeaching a verdict. But he did not keep his erroneous advice to himself; rather, vouching for its correctness on the strength of his long service as a police officer, he stated it again and again to his fellow jurors and thus committed overt misconduct." (*Id.* at pp. 399-400.)

Here, Juror No. 6 touted her expertise as a long-time legal secretary, claiming her profession bestowed upon her a special knowledge of the law. Juror No. 6 proceeded to contradict the court's instruction on the possibility of finding defendant guilty of attempted robbery and carjacking and not guilty of felony murder. We believe, as in *Stankewitz,* this constituted juror misconduct.

The trial court, acknowledging that Juror No. 6's comments might be misconduct, determined this misconduct did not prejudice defendant. On appeal, our analysis of prejudice mirrors that of the trial court. We must examine the entire record to determine whether there is a reasonable probability of actual harm to defendant resulting from the misconduct. Some of the factors we may consider in this analysis are the strength of the evidence that misconduct occurred, the nature of the misconduct and its seriousness, and the probability that actual prejudice may have ensued. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1168.) Our review of the

record reveals no reasonable probability that prejudice actually resulted from Juror No. 6's comments.

Initially we note Juror No. 6 claimed her position as a legal secretary imbued her with special expertise. While still misconduct, the effect of her assertions would likely carry less weight with her fellow jurors than those of a police officer, attorney, or any other legal authority. In addition, the trial court's answer, far more likely to be accorded great weight by the jury, directly contradicted Juror No. 6's pronouncement.

Nor were Juror No. 6's assertions completely inaccurate. The jury questioned whether it could find defendant not guilty of felony murder, but guilty of attempted carjacking and robbery. The trial court answered it could. Juror No. 6 argued that given the evidence before it, the jury could not render such a verdict.

In effect, the trial court correctly informed the jury it could *theoretically* reach such a verdict, but instructed the jury to carefully review the felony murder instructions. During deliberations Juror No. 6 argued the *evidence compelled* a verdict of guilty on the felony murder count. Although it was misconduct to couch her opinion in terms of expertise, Juror No. 6's assertion that the jury had to convict defendant of felony murder if it found him guilty of the attempted carjacking and robbery was supported by the evidence and instructions. In this sense, Juror No. 6's comments were not inaccurate or misleading.

As the Supreme Court has observed, "[n]ot all comments by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such comments cannot impeach a unanimous verdict; a jury verdict is not so fragile." (*People v. Riel* (2000) 22 Cal.4th 1153, 1219 (*Riel*).) Given the evidence before the jury and the trial court's instructions on felony murder, it is not reasonably probable Juror No. 6's comments prejudiced defendant.

3. Sending a Message

Defendant also contends the jury committed prejudicial misconduct by seeking to send a message to the Vlasov jury. Defendant, citing the declarations by Juror No. 3 and Juror No. 5, labels the jury's consideration of the impact of a conviction on the Vlasov jury "unbelievable" and "lawlessness."[6]

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[6] Juror No. 5 stated in her declaration: "We . . . discussed the fact that Mr. Vlasov had killed the young lady and needed to be found guilty of her murder. . . . [¶] . . . [¶] At the end we talked about sending a message to the Vlasov jury to make sure that he was found guilty of the murder. The only way that we could make sure that Mr. Vlasov would be held responsible for the killing was by finding Daniil Zhuk guilty. Although I felt that he was not guilty, to send that statement to the other jurors and make sure that Vlasov was convicted, I changed my vote to find Daniil Zhuk guilty of the murder charge." Juror No. 3 stated in her declaration: "Although I was still certain that Mr. Zhuk was not guilty of the murder charge, but as we were convinced of Vlasov's guilt, we wanted to send a message to the other jury to convict him. Because of that, of the pressure put on us by the legal expert, of the agreement to vote not guilty on the

(Continued on following page)

The court found the portions of the declarations regarding the sending of messages to the other jury reflective of the jury's thought processes and therefore not admissible. In the alternative, the court determined that if the comments were admissible, they were not prejudicial in the context of the entire record. Defendant disputes the court's conclusions.

Evidence Code section 1150 distinguishes between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual jurors, which can be neither corroborated nor disproved. This limitation prevents one juror from upsetting a verdict of the whole jury by impugning fellow jurors' mental processes or reasons for assent or dissent. (*Steele, supra,* 27 Cal.4th at pp. 1263-1264.)

Thus, when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150. (*People v. Lewis* (2001) 26 Cal.4th 334, 388-389 (*Lewis*).)

Here, the jurors' declarations state various jurors talked about sending a message to the Vlasov jury.

Wolbart matter, others and myself who had previously voted not guilty on the Daniil Zhuk murder charge changed our votes to guilty to make sure that Mr. Vlasov would be found guilty of this murder."

Such comments reflect the thought processes of the jury and are not admissible under Evidence Code section 1150.

Defendant asserts the statements concerning sending a message are "statements, which constitute misconduct [and], in and of themselves, are admissible." (*People v. Perez* (1992) 4 Cal.App.4th 893, 908.) We disagree.

The Supreme Court has recognized the difficulty of controlling the minds and voices of 12 jurors who, after all, are humans and not automatons whose every move and sound can be programmed by the court via jury instructions. As expressed in *Riel,* "Not all comments by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such comments cannot impeach a unanimous verdict; a jury verdict is not so fragile. . . . 'The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] Moreover, under that "standard" few verdicts

would be [fool]proof against challenge.' [Citations.]" (*Riel, supra,* 22 Cal.4th at p. 1219.) The comments of jurors in the present case about "sending a message" are the types of illogical rants that do not rise to the level of misconduct.

Similarly, the jurors' comments about the possibility of a hung jury and a harsher sentence on retrial do not amount to reversible error as asserted by defendant.[7]

II. Instructional Error

A. Sua Sponte Instruction on Defendant's Formation of Intent

Defendant argues the court had a sua sponte duty to instruct the jury that it could not find him guilty of felony murder on an aiding and abetting theory unless he formed the intent to aid and abet Vlasov's commission of robbery/carjacking before Vlasov shot Cindy Chung. The People contend the court's other instructions, along with arguments by counsel, informed the jury that defendant could not

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[7] Juror No. 5 stated: "We also talked about how if our jury could not come to a verdict on the Zhuk case because some of us were voting not-guilty, it was possible that Daniil would be worse off if another jury found him guilty." Juror No. 3 stated: "It was discussed that with a hung jury, Daniil Zhuk could possibly receive a worse sentence if he were tried later by another jury than if we just found him guilty of the murder."

be convicted of felony murder based upon intent formed after the shooting.

Under defendant's theory, evidence at trial supported the possibility that defendant had no knowledge of Vlasov's actions at the crime scene, but only became aware of Cindy's murder after they left the scene. Therefore, the trial court had a sua sponte duty to instruct on the timing of defendant's intent.

1. Background

The court instructed the jury on the felony-murder rule: "Defendant Zhuk is accused in Count One of having committed the crime of murder, in violation of section 187 of the Penal Code. [¶] Every person who unlawfully kills a human being during the commission or attempted commission of a carjacking and or robbery, is guilty of the crime of murder in violation of Penal Code Section 187. [¶] In order to prove this crime, each of the following elements must be proved, One, a human being was killed, Two, the killing was unlawful, and Three, the killing occurred during the commission or attempted commission of a carjacking and[/]or robbery. [¶] The unlawful killing of a human being, whether intentional, unintentional or accidental which occurs during the commission or attempted commission of the crime of a carjacking and[/]or robbery, is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit a carjacking and[/]or robbery and the commission or attempted

commission of that crime must be proved beyond a reasonable doubt. If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of carjacking and[/]or robbery, all persons who either directly and actively commit the act constituting that crime or who with knowledge of the unlawful purpose of the perpetrator of the crime, and with the intent or purpose of committing, encouraging or facilitating the commission of the offense . . . by act or advice, in it's [*sic*] commission are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental." (CALJIC Nos. 8.10, 8.21, 8.27.) The trial court also instructed pursuant to the principles of aider and abettor liability. (CALJIC No. 3.01.)

2. Discussion

Under *People v. Pulido* (1997) 15 Cal.4th 713 (*Pulido*), the Supreme Court found that the unmodified felony murder instruction, which the trial court here based its instruction on, appears to tell the jury that an aider and abettor, without any temporal or causal qualification, is liable for first degree murder committed by anyone else engaged in the felony. The *Pulido* court remedied this infirmity by inserting the italicized phrase into the instruction: "'If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime . . . all persons, who either directly and actively commit the act constituting that crime, or who, *at or before the time of the killing,* with knowledge of the

unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid . . . by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental.'" (*Id.* at p. 729.)[8]

Defendant argues the trial court's failure to instruct the jury that felony murder liability attaches only to those who engaged in the felonious scheme before or during the murder constitutes prejudicial error. According to defendant, this case is indistinguishable from *People v. Esquivel* (1994) 28 Cal.App.4th 1386 (*Esquivel*), in which the appellate court reversed for failure to instruct on the timing of the accomplice's intent. We disagree that *Esquivel* compels the same result in the present case.

In *Esquivel,* a jury convicted the defendant of first degree murder based on the felony murder doctrine and the defendant's participation in the underlying robbery as an aider and abettor. The defendant appealed, arguing the court erred in failing to instruct that if the defendant became an aider and abettor to the robbery after the victim had been fatally wounded, he could not be found guilty of

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[8] In the alternative, the *Pulido* court proposed the trial court instruct the jury that the rule of liability described in the instruction does not apply to a person who aids and abets the perpetrator only after the killing has been completed. (*Pulido, supra,* 15 Cal.4th at p. 729.)

felony murder. (*Esquivel, supra,* 28 Cal.App.4th at p. 1392.) The appellate court reversed. (*Id.* at p. 1400.)

Two major differences stand out between the present case and the scenario in *Esquivel.* In *Esquivel,* the prosecution argued to the jury that the victim was already dead when the property was taken, but that if the defendant participated in the robbery he was guilty of felony murder *even if* he did not join the plan to rob until after the murder. (*Esquivel, supra,* 28 Cal.App.4th at p. 1394.) The appellate court noted this statement was incorrect, and that if the design to take property from the victim is formed after the victim has already been killed or mortally wounded, the felony-murder doctrine does not apply. (*Id.* at p. 1396.)

Here, neither party argued that defendant formed the intent to participate in the carjacking or robbery after Cindy's death. The prosecution argued defendant formed the intent at the time or before the trio spotted Cindy's car on the freeway. Defendant maintained he did not know, much less intend, that Vlasov would steal Cindy's car. Defendant stated he sold the gun to Vlasov prior to the murder, denied spotting Cindy's car on the freeway, stated he could not hear the shots because of the car radio, and did not learn of the shooting until much later. Defense counsel, in closing argument, reiterated defendant's lack of knowledge and absence of shared intent.

In *Esquivel,* the appellate court also concluded evidence in the record could reasonably support an

inference that the defendant did not form the intent to participate in the robbery until after the victim was dead. (*Esquivel, supra,* 28 Cal.App.4th at p. 1397.) The trial court had noted there was no testimony that the defendant entered the property to commit a felony. Various witnesses testified the defendant stated the perpetrator struck the victim after being asked to leave. The defendant fled in fear during the attack. The appellate court found this evidence sufficient for the jury to be instructed on the timing of the defendant's intent. (*Id.* at pp. 1397-1398.)

The present case offers no such evidence to support the inference that defendant formed the intent to participate in the carjacking after Cindy's death. Defendant cites Vlasov's statement, "Let's get out of here," following the shooting; Vlasov's [sic] firing of the gun out of the car window; and Vlasov's later statement to defendant that he shot at the white BMW as evidence defendant did not form the intent to carjack until after the shooting. In addition, defendant claims the testimony that he spotted Cindy's car while he was driving northbound on the freeway was geographically impossible.

Unfortunately, defendant's efforts to construct a plausible scenario of his joining the carjacking after the fact ignores his own testimony. Defendant testified he had no knowledge or intent even after the shooting, but only learned of the murder much later. He testified he did not believe Vlasov immediately after the murder when he told defendant about

shooting at the BMW, even though defendant testified Vlasov said "Let's get out of here" when he returned to the car. Therefore, no evidence reflected an intent by defendant to participate in the crime after the fact. The evidence did not support an additional instruction about the scope of complicity for late-joining accomplices. The court had no sua sponte duty to give additional instructions that defendant's intent had to have been formed before the shooting.

B. CALJIC No. 3.16

The court instructed pursuant to CALJIC No. 3.16: "If the crimes charged in Counts One, Two or Three was [*sic*] committed by anyone, the witness Mikhael Vlasov was an accomplice as a matter of law. And his testimony is subject to the rule requiring corroboration." This instruction, according to defendant, compelled the jury to reject his theory that he was unaware of Vlasov's intentions, precluded the jury from finding Vlasov the sole murderer of Cindy Chung, and required finding defendant guilty as an aider and abettor.

Defendant suggests the following analysis: (1) it is undisputed Vlasov killed Cindy Chung, (2) the trial court instructed the jury that an accomplice is a person subject to prosecution for the identical offenses charged in the Cindy Chung counts against defendant, and (3) "because the only person as to whom Mr. Vlasov could have been deemed an aider and abettor in this case was Mr. Zhuk." Therefore,

the court's instruction removed the issue of aider and abettor liability from the jury and resolved it against defendant.

The People respond any error was invited given that defense counsel requested the instruction. Defendant acknowledges the instruction was requested but argues that counsel, in so requesting, performed ineffectively; there was no sound basis for requesting an instruction that compelled a guilty verdict. We find no error.

Section 1111 provides that an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant. . . ." "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ibid.*)

When accomplice instructions are applicable, the court must define an accomplice, inform the jury of the requirement that accomplice testimony must be corroborated, explain what is required for corroboration, and tell the jurors to view the testimony of an accomplice with caution. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) If the trial testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271.)

In *People v. Heishman* (1988) 45 Cal.3d 147 (*Heishman*), a case relied on by the Attorney General, the defendant contended his former girlfriend, Nancy Gentry, was the killer and that she acted alone. (*Id.* at p. 162.) The prosecution introduced evidence that the defendant killed the victim. (*Id.* at pp. 158-161.) The jury instructions defined principals as including those who directly and actively commit the crime and those who aid and abet in its commission with knowledge of the unlawful purpose of the perpetrator. As to accomplices, the court instructed that an accomplice is one who is subject to prosecution for the identical offense charged against the defendant at trial. The court also instructed that, as to the murder charge, if the murder was committed by anyone, witness Gentry was an accomplice as a matter of law and her testimony was subject to corroboration. (*Id.* at p. 162.)

Defendant argued that the instructions directed the jury to find Gentry was an accomplice and therefore precluded the jury from finding she acted alone. The court disagreed: "We do not believe the jury could have so understood the instruction. [¶] The instructions did not literally tell the jury it could not find Gentry was the killer. And Gentry was legally an accomplice 'if the crime of murder was committed by anyone' including Gentry herself. CALJIC No. 3.16 was given to make clear that Gentry was being labeled an accomplice for purposes of the rule requiring corroboration if her testimony were believed. The instruction could not reasonably be understood as precluding rejection of her testimony – including

rejection based on a conclusion that in fact she was the killer. [Citation.] Defendant's interpretation of the instruction would make it practically a direction of conviction. Yet the jury was fully instructed on the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt." (*Heishman, supra,* 45 Cal.3d at pp. 162-163.)

While defendant insists that *Heishman* is distinguishable, the similarities are great. In *Heishman,* the identity of the perpetrator was disputed; the defendant insisted Gentry acted alone and to label her an accomplice suggested complicity on his part. Here, Vlasov admits firing the shot that killed Cindy Chung. The prosecution proceeded against defendant on an aider and abettor theory. Defendant insists that Vlasov acted alone without revealing his intentions to defendant and argues that by labeling Vlasov an accomplice as a matter of law, the effect was to impute Vlasov's guilt to defendant.

Despite some differences in the underlying facts, the *Heishman* case is instructive here. Like the instruction in *Heishman,* the instruction challenged here did not tell the jury that any person was necessarily guilty of the charged crimes. The jury was informed that if they found the crimes had been committed, Vlasov was an accomplice. The consequence flowing from his status as an accomplice was then spelled out: the jurors must view his testimony with caution and he is subject to the rule requiring corroboration of his testimony. There is no indication that either the court, counsel, or the jury understood

that the court's instruction on Vlasov's status as an accomplice had any other consequence.[9] Contrary to defendant's claim, the instruction did not preclude the jury from concluding Vlasov was solely responsible for Cindy Chung's death.

Defendant finds support for his position in *People v. Hill* (1967) 66 Cal.2d 536, 555. Interestingly, *Hill* is a case where the defendant complained about the trial court's failure to instruct, as the court did here, that a coparticipant was an accomplice as a matter of law. The Supreme Court agreed, but also noted: "[W]here a codefendant has made a judicial confession as to crimes charged, an instruction that as a matter of law such codefendant is an accomplice of other defendants might well be construed by the jurors as imputing the confessing defendant's foregone guilt to the other defendants. [Citation.] It is not

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[9] It is also significant that the instruction allowed the jury to conclude another person might have also been an accomplice to the charged crimes. Although Peter P. was not charged with the crimes, the court instructed the jury it could conclude Peter P. was an accomplice. Evidence at trial revealed Peter P. left the car while it was parked at the murder scene, shot the gun after the murder, and helped dispose of the gun. This evidence raised the possibility that Peter P. acted as an accomplice; indeed, the jury inquired as to why he had not been charged as an accomplice. Thus, defendant's premise that "the only person as to whom Mr. Vlasov could have been deemed an aider and abettor in this case was Mr. Zhuk" is incorrect. In any event, the characterization of Vlasov as an accomplice could not have been plausibly construed by the jury as a declaration of defendant's guilt.

error even to forego the giving of accomplice instructions where the giving of them would unfairly prejudice a codefendant in the eyes of the jury. [Citation.] In the instant case it was not error to leave to the jury the determination of [the coparticipant's] role as an accomplice and thus avoid imputations of the guilt of [the complaining defendants] which might have flowed from the court's direction that the confessing [coparticipant] was their accomplice as a matter of law." (*Id.* at pp. 555-556.)

We are mindful of the possible prejudice that could result where a confessing codefendant is labeled an accomplice as a matter of law. However, as discussed, we find no such prejudice in the present case. This was not a "who-done-it" case where the jury was left to decide whether Zhuk or Vlasov shot Chung. We note the prosecutor's argument to the jury that, "I think it has been clear since day one, that Mr. Zhuk did not shoot Cindy Chung to death. . . . Mr. Vlasov did that," and "[Zhuk] aided and abetted, he caused it." Vlasov's defense was not that he didn't do it, but that he did [it] under coercion. Thus, to label Vlasov as an accomplice under such circumstances is not to suggest that defendant was a direct perpetrator or was a co-accomplice. It was simply to declare that Vlasov has a motive to lie and thus his testimony should be viewed with caution.

And that was the import of the defense argument to the jury: Vlasov was not to be believed. He did it and he did it without the knowledge or participation of defendant. Like the trial court in *Heishman*, the

court here instructed the jury on the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt. Given the evidence before the jury and the argument of counsel, the wording of the instruction, and the other instructions given, we find beyond a reasonable doubt that the jury did not apply the instruction in violation of defendant's constitutional rights. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]; *Boyde v. California* (1990) 494 U.S. 370, 380 [108 L.Ed.2d 316].)

III. Questioning by Vlasov's Counsel About Defendant's Request for Counsel

Defendant argues the trial court committed reversible error in allowing Vlasov's counsel to elicit testimony from officers concerning defendant's exercise of his right to counsel. The People argue any brief references to defendant's request for counsel do not amount to error.

A. Background

During direct examination, Sacramento Sheriff's Deputy Gary Bagley testified Bill Wilson brought a bag containing a gun to juvenile hall. During recross examination, Vlasov's counsel asked: "Deputy, now it was obvious however, that when these folks came in with this gun, it wasn't just so Daniil Zhuk here could give the police information about the gun and what had happened, was it?" After the court sustained an

objection on vagueness grounds, Vlasov's counsel asked: "The fact of the matter is when Mr. Zhuk and his father and the Wilsons came in, they told you they came in so that Mr. Zhuk could talk to a lawyer, didn't they?" Bagley answered: "That's correct." Vlasov's counsel continued: "And the lawyer came out from the Public Defender's Office and Mr. Zhuk went in to talk to his lawyer and that's when you all talked about how Mr. Zhuk and Mr. Wilson wound up with the gun; isn't that what happened?" Bagley answered: "Yes, that's correct."

During the recross examination of Bagley, defendant's counsel also referred to defendant's invocation of his right to counsel: "And as a result of talking to these individuals, and you say that Mr. Zhuk was there to seek counsel or to talk to an attorney or something like that, you became aware that Mr. Zhuk knew something about this crime, the father, right?" Bagley answered: "That's correct." Defense counsel continued: "All right. They didn't try to hide that fact from you or anything else like that, did they?" Bagley answered: "No."

Defense counsel later placed his earlier objection to Bagley's testimony on the record. The court acknowledged defense counsel objected during a sidebar but did not request a jury admonition. Instead, the court ordered Vlasov's counsel not to delve into the issue of invocation of counsel again. The court noted it did not believe Bagley's testimony amounted to

Doyle error.[10] Defense counsel explained he did not object on the record or request an admonition so as not to highlight the issue. The trial court again warned Vlasov's counsel not to delve into anything concerning defendant's invocation of his right to counsel.

Vlasov's counsel defended his questioning of Bagley, arguing it countered defendant's altruistic gloss on the visit to juvenile hall: to aid police. The prosecution concurred, contending the curtailment of Bagley's testimony cast defendant in the role of a good Samaritan in turning in the gun without revealing his other motive, to obtain legal counsel. The court and defense counsel agreed there were three reasons defendant went to juvenile hall: to turn in the gun, to provide information on the crime, and to seek counsel. The court found no error in "bringing forth evidence that they went there for all three reasons" but forbade any further inquiry into the matter of attorney contacts.

Prior to questioning Wilson, the prosecutor argued limited leading questions might permit him to "go around some of those land mines." Vlasov's counsel informed the court [he] intended to ask Wilson whether one of the reasons he brought defendant to juvenile hall was to have him see an attorney. The court stated it would instruct Wilson to answer only yes or no and overruled defendant's objection.

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[10] *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (*Doyle*).

Outside the jury's presence, the court discussed with Wilson potential testimony regarding defendant's invocation of his right to counsel. The court told Wilson: "[T]he law with regard to people's exercise of their right to counsel to see attorneys is difficult. In a nutshell the fact that a person seeks out an attorney or what that attorney says to them or what advice they follow from the attorney, any information of that nature cannot be heard by a jury. It is prohibited. There is [*sic*] all kinds of cases . . . that uphold that fundamental rule. [¶] So with the exception I am going to mention to you in just a second with regard to any question that is asked you by any attorney, I don't want you to make reference to attorneys or what attorneys said, or what advice was taken from attorneys or anything regarding the attorneys, if you cannot answer a question without making reference to that subject matter, I want you to get my attention." Wilson stated he understood. The court warned Wilson of the consequences of running afoul of its instructions and instructed him to listen very carefully to the question by Vlasov's counsel that one of the reasons Wilson, defendant's father, and defendant went to juvenile hall was for defendant to seek counsel. The court admonished Wilson to answer yes, no, or I don't know without any elaboration.

The question was rehearsed, with the court giving its admonition and Wilson answering. Vlasov's counsel obtained the trial court's approval to ask whether there were other reasons for their going to juvenile hall.

Wilson then testified before the jury that he brought the weapon to juvenile hall and turned it in. During cross-examination, the following colloquy occurred: "[Vlasov's Counsel]: You all went out to juvenile hall. One of the reasons you went out there was so that Daniil Zhuk could get legal advice from a lawyer, correct? [¶] The Court: Okay. I want a yes[,] no[,] or I don't know to that question. [¶] The Witness: Yes. [¶] [Vlasov's Counsel]: I'm just asking if that's one of the reasons? [¶] A: Yes. [¶] Q: There were other reasons you all went out there, too, like to take the gun out, correct? [¶] A: Yes."

B. Discussion

Defendant contends the trial court allowed impermissible testimony regarding his exercise of his right to counsel. The People argue no prejudice resulted from the elicited testimony.

The right to counsel is so basic to all other rights that it must be accorded careful treatment. Attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and constitute reversible error. (*People v. Fabert* (1982) 127 Cal.App.3d 604, 610.)

In *People v. Schindler* (1980) 114 Cal.App.3d 178, 186-189 (*Schindler*), the court reversed a conviction where the defendant's responses in asserting her *Miranda* rights were admitted to rebut her claim of diminished capacity. The court relied on *Miranda v. Arizona* (1966) 384 U.S. 436, 468, footnote 37 [16

L.Ed.2d 694] (*Miranda*) and *Doyle, supra,* 426 U.S. 610, cases which also involved the exercise of constitutional rights at the time of arrest and after the receipt of *Miranda* warnings. The Supreme Court in *Miranda* declared: "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." (*Miranda,* at p. 468, fn. 37.)

In *Doyle,* the court explained that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Doyle, supra,* 426 U.S. at p. 618.)

Here, defendant was not under investigation and did not request counsel following *Miranda* warnings. It is not clear that the rule of *Schindler* applies. Regardless, it clearly is not the rule that any reference at trial to a defendant's request for counsel during the course of a criminal investigation renders a guilty verdict infirm.

Defendant insists the inquiry constituted a "serious constitutional transgression" and believes we should reverse "in light of the facts that Mr. Zhuk's jury was a rogue jury, that Mr. Zhuk's trial was

plagued by numerous other errors and irregularities, and that the case against Mr. Zhuk was based substantially on the statements and testimony of Mikhael Vlasov and Peter [P.], both of whom are individuals of questionable credibility, this is not a case in which a serious constitutional transgression can be deemed harmless."

We are not persuaded. We agree with respondent that the brief mention by witness Wilson of defendant's desire to get legal advice at juvenile hall "did not draw undue attention to [defendant's] exercise of constitutional rights." The matter never rose again during the lengthy trial. The trial court appropriately circumscribed Wilson's testimony, minimizing its impact. Given the brevity of the comment and the lack of follow-up, we cannot say defendant suffered prejudice from the brief reference to his desire for counsel even if the court erred in permitting the inquiry.

IV. Defendant's Request That Codefendant Vlasov be Present During Wolbart's Testimony

Defendant argues the trial court erred in denying his request to have codefendant Vlasov present in the courtroom during Wolbart's testimony. Although the jury acquitted defendant of counts five and six, the attempted robbery and assault of Wolbart, defendant insists the court's ruling prejudiced him on the charges associated with Cindy Chung.

A. Background

Prior to Wolbart's testimony, the Vlasov jury was excused at Vlasov's request. The court noted defense counsel requested that Vlasov be brought in during his examination of Wolbart. Defense counsel would ask Wolbart if she recognized Vlasov, and if there was any chance Vlasov was the perpetrator and not defendant.

Defense counsel explained his reasoning, pointing out that Wolbart identified Vlazov in a lineup, but not as strongly as she identified defendant in an earlier lineup. Defense counsel stated: "I think there is a real issue here whether or not the wrong person is charged and as part of my defense, I think, I have the right at the very least to have Mr. Vlasov brought into court and see if this lady can identify him. [¶] And, secondly, I believe for fairness and due process that Mr. Vlasov [should] be seated at counsel table. [¶] He won't be charged with this thing. I see no prejudice to Mr. Vlasov."

Vlasov's counsel objected, pointing out he had received no prior notice of defense counsel's request. Vlasov's counsel also noted defendant had other evidence available to him: the different heights and weights of the codefendants, and Wolbart's misidentification in one of the photo lineups. He also stated he would agree to a lineup.

The prosecution objected to a lineup four years after the crime. The prosecution stated it would

present to the jury the photo lineups viewed by Wolbart.

The court denied defense counsel's request for Vlasov to be present but stated it would consider a motion for a lineup. The court reasoned: "I believe there is liability risk to Mr. Vlasov. [¶] It is within the . . . time frame for prosecution. It is possible with these facts that the County District Attorney could refile. . . . [¶] There is also federal exposure here. The only reason I hesitated is the lineup would be so unduly suggestive that it would run the likelihood of being excluded. [¶] But given the totality of the circumstances, I am not sure that would be the case. [¶] And he is entitled, Mr. Vlasov, is entitled to a constitutional lineup before someone identifies him as the committer of a robbery if it evolved in that fashion."

Defense counsel moved for a physical lineup. The court denied the request as untimely, stating it would not keep the jury out any longer. The court also stated it would consider a later lineup motion.

B. Discussion

Defendant argues the trial court denied his constitutional right to present his defense that Vlasov, rather than he, committed the offenses against Wolbart. He reasons that if the government can compel a defendant's presence at trial for identification purposes, then surely a defendant has a right to compel a suspect/codefendant for the same purposes. Whatever the

merits of this syllogism, defendant's argument falters in light of his success in defending against the Wolbart charges. Even without Vlasov's presence and Wolbart's anticipated testimony, defendant was acquitted. It is reasonable to ask: where is the prejudice?

Defendant points to the "vote trading" he alleges took place during deliberations. Since jurors traded guilty votes against defendant in connection with the Wolbart charges for guilty votes against him on the murder charge involving Cindy Chung, the prejudice in connection with the Wolbart charges "necessarily extends to his defense against the homicide charge." As discussed at pages 23 to 28, *ante,* we find the juror give and take, which defendant terms "vote trading," did not result in juror misconduct. Therefore, no prejudice resulted from Vlasov's absence during Wolbart's testimony.

V. Character Evidence

Defendant contends the testimony of Vlasov's brother, Andrey Vlasov, during Vlasov's defense case amounted to impermissible character testimony.[11] According to defendant, Andrey stated defendant was a bad person and blurted out that defendant had once threatened to shoot him. Defendant argues the trial

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[11] Again, for clarity, we will refer to codefendant Vlasov's brother by his first name.

court erred in denying defendant's motion for a new trial and in not striking Andrey's testimony.

A. Background

Vlasov's counsel notified defendant's counsel that he intended to present Evidence Code section 1101, subdivision (b) evidence concerning defendant. The court requested a preview of the evidence. The following day, the court and counsel discussed a December 1999 incident in which defendant threatened Vlasov's family. The court requested confirmation that defendant had brandished a weapon and deferred further discussion.

Vlasov's counsel later made an offer of proof on the threats, arguing they were relevant to a theory of duress. Vlasov's counsel contended the threats tended to show Vlasov's state of mind at the time of the Chung murder, since Vlasov knew defendant carried a gun and had threatened people with a gun. Vlasov's counsel explained that after Andrey told defendant not to come around, defendant told him he had friends who could kill them. Vlasov's counsel argued this disproved defendant's claim that he was a passive, nonviolent person.

Though the court found the evidence troubling "because it represents risk for fundamental justice here," it ultimately permitted testimony that the Vlasov family asked defendant not to come around and that he defied that request. However, the court

excluded, under Evidence Code section 352, the proposed testimony about the purported death threat.

Andrey testified that Vlasov had changed "for the very worst" after becoming acquainted with defendant. Vlasov's counsel asked: "Why was it so important to stop [Vlasov] from being with [defendant] that you went so far as to beat him with your fist?"

Defense counsel objected, and outside the jury's presence the court inquired into Andrey's answer. Andrey stated his answer would be that it was because he heard defendant was a bad person. The court found the probative value of the evidence was not substantially outweighed by its prejudicial impact. The court reasoned: "The prejudice that [defense counsel] argues here is not without merit. It is just in the context of the situation where his client takes the stand and testifies to committing multiple misdemeanors and felonies and a felony, and so it's, you know, it's comparatively innocuous juxtaposed to that testimony. [¶] It is further innocuous when the Court considers that I have excluded two previous specific incidents involving Mr. Zhuk in assaultive or threatening behavior to the Vlasov family." The court also stated it would instruct the jury that the evidence was not to be considered as character evidence but to explain Andrey's conduct and his assaultive behavior toward Vlasov.

Andrey's testimony continued and Vlasov's attorney asked, "by the time things got around to the beating, had you heard that Daniil was a bad person?"

Andrey answered: "I have already said that, not did I only hear that." The court sustained defense counsel's objection and admonished the jury: "One, you cannot consider this last answer for the truth of the matter asserted, because it is hearsay. [¶] You can only consider it as it affects his state of mind and may help explain in someway [*sic*] why he engaged in the conduct he did against Mr. Vlasov. [¶] You specifically cannot consider it as evidence that Mr. Zhuk is a bad person."

Later, defense counsel asked Andrey: "Now, Mr. Vlasov, isn't it true that you tried to get Daniil to say that he was the shooter after your brother [Vlasov] was arrested?" Andrey answered: "Because he wanted to shoot at me." Defense counsel objected, and the trial court struck Andrey's answer.

Outside the presence of the jury, defense counsel requested a mistrial or, in the alternative, that the court strike Andrey's testimony in its entirety. Defense counsel argued that Andrey "deliberately sabotaged the situation" because he knew he could not volunteer the information. The court denied the motion, noting it had sustained defendant's objection, stricken Andrey's answer, and would admonish him.

The court proceeded to admonish Andrey: "It's my impression on a couple of occasions you have gone beyond the minimum necessary to properly answer a question. [¶] . . . [¶] . . . Specifically answer the question asked and [do] not go beyond." The court made

clear that these directions were an order to be followed by the witness.

B. Discussion

Defendant acknowledges that the court gave the jury a limiting instruction regarding Andrey's testimony and ordered stricken Andrey's statement that defendant wanted to shoot him. However, defendant argues "there is absolutely no reason to believe that *this jury* heeded such instructions. Indeed, as discussed above, this jury proved itself ready, willing, and able to disregard many of the trial court's most basic instructions."

We are not persuaded. The trial court, cognizant of the danger of character evidence being introduced by Andrey against defendant, admonished Andrey prior to his testimony and properly instructed the jury on how to view the evidence. After Andrey blurted out his brief comment about defendant's wanting to shoot him, the court properly struck the testimony. The court acted appropriately and we presume the jury followed the court's instructions concerning Andrey's testimony. (*People v. Burgener* (2003) 29 Cal.4th 833, 870.)

Even if the court erred in not completely striking Andrey's testimony, such error was not prejudicial. Given the evidence against defendant, it is not reasonably probable defendant would have achieved a more favorable result in the absence of Andrey's brief,

albeit negative, comments about defendant's relationship with the Vlasov family.

VI. Sufficiency of the Evidence That Defendant was a Major Participant

Defendant argues there was insufficient evidence he acted as a "major participant" as required to sustain the special circumstance under section 190.2, subdivision (d) that Chung's murder occurred during the commission of attempted carjacking and attempted robbery. Section 190.2, subdivision (d) states, in part: "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony . . . and who is found guilty of murder in the first degree . . . shall be punished by death or imprisonment . . . for life without the possibility of parole. . . . "

Defendant argues the worst that can be said of his role in the events leading to Cindy's death "is that he initiated the plan to steal her car, he followed the car on the highway, he supplied a gun to Mr. Vlasov, and he pressured Mr. Vlasov to attempt to steal the vehicle. Beyond that, there is no evidence that his own role was to be anything more than a getaway driver. There is no evidence that he intended for Ms. Chung to be killed. Indeed, there is no evidence that he intended for any harm to come to her." (Fn. omitted.)

In *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127] (*Tison*), the Supreme Court held that the death penalty was not a disproportionate penalty, provided the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. In *Tison,* two brothers aged 19 and 20, with no prior records, helped their father escape from prison. They armed him and his cellmate for the escape, helped the two escapees rob a family, and did not intervene when the escapees shot the murder victims. Neither brother was the actual killer, nor did either act with the intent to kill. (*Id.* at pp. 141-143.) The Supreme Court found the brothers' death sentences constitutionally permissible based on their major participation in the felony, combined with their reckless indifference to human life. (*Id.* at pp. 138, 158.)

Defendant underscores the *Tison* court's contrast between the "midrange felony murder case" it considered with the "far different" case of "merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery." (*Tison, supra,* 481 U.S. at p. 157.) The *Tison* court found conduct of the latter variety is considered a minor role in the felony-murder context. (*Ibid.*) Defendant contends his conduct in the current case mirrors such "minor" conduct. We disagree.

In reviewing the sufficiency of the evidence for a special circumstance, as for a conviction, we consider whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the allegation beyond a reasonable doubt. (*People v. Dickey* (2005) 35 Cal.4th 884, 903) The phrase "major participant" is used in the common sense, as in "one of the larger or more important members or units of a kind or group" and "notable or conspicuous in effect or scope." (Webster's New Internat. Dict. (3d ed. 1971) p. 1363.) There is no minimum threshold of participation that qualifies a person as a "major participant" in a crime; the defendant need not necessarily be the ringleader or the triggerman. (*People v. Proby* (1998) 60 Cal.App.4th 922, 933-934 (*Proby*).)

The record before us contains sufficient evidence that defendant acted as a major participant in the murder of Cindy. Defendant concocted the scheme to carjack Cindy's car, telling his companions they could get $3,000 for a BMW in good condition. He followed Cindy as she drove from Sacramento to Rancho Cordova. As Cindy exited the freeway, defendant followed her on surface streets as she drove to the family business.

Defendant gave Vlasov the loaded gun and instructed him to "go find the car and try to take it from her." Defendant proposed the scenario in which Vlasov would run up to Cindy's car, stick the gun in her face, and tell her to get out of the car. Defendant taunted Vlasov, shaming him into committing the carjacking.

After failing at his original attempt, Vlasov returned; defendant insulted him and ordered him to

try again. Defendant also ordered Peter P. to help Vlasov, insulting him when he refused. Defendant repositioned his car for a quick getaway.

After the shooting, defendant did not ask about Cindy or in any way attempt to help her. Defendant drove away and wrecked his car to provide an alibi. He later bragged to a friend that he had gone to steal a car and the woman who resisted "ended up being dead."

Defendant's participation qualifies as notable or conspicuous in effect or scope. (*Proby, supra,* 60 Cal.App.4th at pp. 931-934.) He played a major role in the plot to carjack Cindy's BMW, instigating the crime, supplying the weapon, and badgering his companions into carrying out the carjacking. After Cindy was shot, defendant drove the getaway car, manufactured an alibi, and disposed of the murder weapon. A defendant who arms the killer, is present at the murder, and flees with the killer, leaving the victim to die, is a major participant in the robbery. (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754-1755.) Sufficient evidence supports the special circumstance that defendant was a major participant in the murder of Cindy.

VII. Constitutionality of Felony-Murder Rule Involving Juvenile Defendants

Defendant patches together an assortment of objections to the felony-murder rule and various observations about proportionality in punishment,

the culpability of minors, and their amenability to deterrence into an earnest argument that the rule is unconstitutional as applied to juvenile defendants. Defendant's argument begins with quotes from *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), wherein the felony-murder rule is characterized as "unjustifiable." (*Id.* at p. 488.) The central problem, according to Justice Mosk's plurality opinion, is that the prosecution need not prove malice, a problem that is exacerbated where the rule's application is predicated on aider and abettor liability. (*Id.* at p. 475.) According to defendant, the rule is also inconsistent with the basic principle that punishment should be directly related to the personal culpability of the criminal defendant. And noting that the purpose of the felony murder rule is to deter those who commit an enumerated felony from killing by holding them strictly responsible for any killing committed by a cofelon (*People v. Cavitt* (2004) 33 Cal.4th 187, 197), defendant argues since juveniles are not as susceptible to deterrence as adults, the deterrence aspect of the felony-murder rule is of limited utility and is therefore not justifiable when applied to juvenile defendants.

In *Dillon*, the California Supreme Court considered an attempted raid of a marijuana field by a group of teenagers. A teenaged defendant, surprised by an armed guard, shot and killed the guard. The Supreme Court found the first degree felony-murder rule constituted cruel and unusual punishment under those circumstances. (*Dillon, supra,* 34 Cal.3d at p. 489.) Apart from *Dillon,* defendant also relies on

Roper v. Simmons (2005) 543 U.S. 551 [161 L.Ed.2d 1] (*Roper*). In *Roper,* the United States Supreme Court addressed the constitutional limitations on the death penalty when applied to minors, finding minors less culpable and the death penalty for minors inconsistent with evolving standards of decency.

While the court in *Dillon* concluded the first degree murder penalty constituted cruel and unusual punishment under the circumstances there presented, the court declined to hold the felony-murder rule unconstitutional as applied to juveniles. Justice Mosk observed, "this court does not sit as a superlegislature with the power to judicially abrogate a statute merely because it is unwise or outdated." (*Dillon, supra,* 34 Cal.3d at p. 463.) Nor has the Legislature or the Supreme Court subsequently seen fit to abrogate the rule.

Roper considered the defendant's age in the context of a death penalty case; defendant in the present case faces life in prison without the possibility of parole. It is true that *Roper* acknowledged minors are less responsive to deterrence. However, there is no suggestion in *Roper* or any other reported decision that the impetuousness of youth should exempt juveniles from application of the felony-murder rule in noncapital cases.

Deterrence is a goal of punishment generally; it is not confined to the felony-murder rule. Punishment often fails to deter but it is idle sophistry to suggest such failure requires punishment to be withheld. Like

punishment, the felony-murder rule serves various policies, including deterrence. Reasonable minds can disagree over the impact of deterrence on underage defendants and whether the policies underlying the felony-murder rule are well served by applying the rule to the actions of juveniles. Suffice it to say that the outcome of that debate does not raise issues of constitutional significance. Accordingly, we reject defendant's assertion that the felony-murder rule is unconstitutional when applied to juveniles.

VIII. Sentencing Error

Defendant challenges his sentence of life without possibility of parole, arguing it violates his Sixth Amendment rights and the trial court abused its discretion in imposing the sentence. The People contend defendant has waived his Sixth Amendment claim and has failed to show an abuse of discretion on the part of the trial court.

Under section 190.5, subdivision (b), a court must impose a sentence of life without possibility of parole on a defendant who, at the age of 16 or 17, committed a special circumstance murder *unless* the trial court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141 (*Guinn*).) Here, the trial court declined to impose the less severe sentence.

Defendant argues the trial court's action runs afoul of *Apprendi v. New Jersey* (2000) 530 U.S. 466

[147 L.Ed.2d 435] (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*) since the trial court, and not the jury, made the findings underpinning the sentence.

However, as the People note, *Apprendi* and *Blakely* implicate only situations in which a court finds facts that increase a sentence beyond the maximum. Here, section 190.5 establishes life without parole as the presumptive punishment for special circumstance murder committed by those in defendant's age group. Section 190.5, subdivision (b) grants the trial court discretion to impose a more lenient sentence. Section 190.5 "does not involve two equal penalty choices, neither of which is preferred. The enactment by the People evidences a preference for the [life without parole] penalty." (*Guinn, supra,* 28 Cal.App.4th at p. 1145.)

The court in the present case considered defendant's arguments for leniency and rejected them. This did not amount to the court, instead of the jury, making findings that increased defendant's sentence beyond the statutory maximum. The court's decision not to reduce defendant's sentence did not implicate Sixth Amendment rights discussed in *Apprendi* and *Blakely.*

Defendant also labels the trial court's refusal to impose the lesser sentence an abuse of discretion. According to defendant, "No rational person can genuinely argue that the imposition of a [life without parole] sentence upon a juvenile who was convicted of

murder in a case in which he had no intent to kill is an [ ]appropriate sentence."

We do not disturb the trial court's exercise of its discretion absent a showing that the trial court acted in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1434.) Here, the trial court, after reviewing the evidence at trial, determined defendant was the dominant party in the carjacking that led to Cindy's death. Defendant made the decision to pursue Cindy, handed Vlasov a loaded gun, and goaded Vlasov into stealing Cindy's BMW. According to the court, defendant was the "idea maker, the implementer" in the chain of events that resulted in Cindy's death. Ultimately, the court described defendant's role in the murder as an "evil role."

After reviewing the facts, the trial court declined to grant leniency under section 190.5, subdivision (b). Given the facts of this case, we cannot find the court's conclusion arbitrary, capricious, or absurd. Nor does the trial court's imposition of life without possibility of parole on defendant constitute a manifest miscarriage of justice. Defendant fomented the plot to steal Cindy's car. Defendant handed Vlasov a loaded gun. Defendant goaded and bullied Vlasov into approaching Cindy with the loaded gun to steal her BMW. Defendant browbeat Vlasov to return after an initial unsuccessful attempt. Defendant drove away from the murder scene and concocted an alibi. None of these facts support leniency.

IX. Cruel and Unusual Punishment

Defendant challenges his sentence of life without possibility of parole as cruel and unusual punishment in violation of his constitutional rights under both the United States and California Constitutions. Defendant emphasizes his youth and argues that he did not intend for Cindy to be killed, although he instructed Vlasov to steal her car.

A. Cruel or Unusual Punishment under the California Constitution

Defendant contends his sentence runs afoul of article I, section 17 of the California Constitution since he was only 17 at the time of the murder and had no prior history of violence. According to defendant, his punishment is disproportionate to his personal culpability and therefore constitutes cruel or unusual punishment.

In order to determine whether a sentence is cruel or unusual, we examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. We also consider the defendant's personal characteristics, including age, prior crimes, and mental capacity. (*Dillon, supra,* 34 Cal.3d at p. 479.) After reviewing these factors, if we find the penalty imposed grossly disproportionate to the defendant's culpability, we must invalidate the sentence as

unconstitutional. (*People v. Cox* (1991) 53 Cal.3d 618, 690.)

Defendant likens his situation to that of the defendant in *Dillon,* whose sentence the Supreme Court found constitutionally excessive. (*Dillon, supra,* 34 Cal.3d at p. 489.) According to defendant, he is less culpable than the defendant in *Dillon,* who admitted shooting the victim nine times. We find *Dillon* presented a far more complex scenario than defendant suggests.

In *Dillon,* the 17-year-old defendant and his companions armed themselves in order to steal marijuana from a secluded farm. The victim, who was guarding the farm and armed with a shotgun, approached the defendant. The defendant, believing the victim was going to shoot him, panicked and shot the victim. (*Dillon, supra,* 34 Cal.3d at pp. 451-452, 482-483.) The Supreme Court found the defendant's sentence of life with the possibility of parole excessive. (*Id.* at p. 489.)

Here, defendant concocted a scheme to threaten an unarmed driver with a gun in order to steal her highly desirable car. Defendant did not act in self-defense or panic, but instead coolly and calculatingly plotted a potentially lucrative crime that led to Cindy's death.

In addition, the defendant in *Dillon* had no prior trouble with law enforcement. (*Dillon, supra,* 34 Cal.3d at p. 488.) Here defendant, prior to the carjacking of Cindy, had a long history of burglarizing

and stripping cars. He progressed to carjacking and touted his ability to sell luxury cars to the Russian Mafia. After Cindy's murder, defendant drove the getaway car following the unsuccessful carjacking of Lopez. He also participated in the attempted carjacking of Wood.

Dillon does not compel a finding of cruel or unusual punishment in the present case. We also note section 190.5 specifically authorizes the charging of special circumstances and life without possibility of parole for persons aged 16 or 17 at the time of the offense.

In *Guinn, supra,* 28 Cal.App.4th 1130, the appellate court rejected an argument that section 190.5 violated state and federal constitutional prohibitions against cruel and/or unusual punishment because it did not provide adequate guidelines for the court's exercise of its discretion. The court concluded: "While we agree that the punishment is very severe, the People of the State of California in enacting the provision have made a legislative choice that some 16- and 17-year-olds, who are tried as adults, and who commit the adult crime of special circumstance murder, are presumptively to be punished with [life without parole]. We are unwilling to hold that such a legislative choice is necessarily too extreme, given the social reality of the many horrendous crimes, committed by increasingly vicious youthful offenders, which undoubtedly spurred the enactment." (*Guinn, supra,* 28 Cal.App.4th at p. 1147.)

Given the circumstances surrounding Cindy's murder, which was motivated by defendant's desire to steal her BMW, defendant's role as instigator and supplier of the murder weapon, and the horrific ultimate consequence, the death of an innocent young woman, we cannot find defendant's sentence constitutes cruel or unusual punishment under the California Constitution.

B. Cruel and Unusual Punishment Under the United States Constitution

Defendant also contends his sentence runs afoul of the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Under the Eighth Amendment, the issue is whether a defendant's sentence is grossly disproportionate to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836].)

Defendant argues that under *Roper, supra,* 543 U.S. 782 and *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 246] (*Enmund*), his sentence constitutes cruel and unusual punishment. We disagree.

Roper, as discussed previously, concerned a death penalty case involving a juvenile defendant. Here, we consider a sentence of life without possibility of parole. Defendant cites *Enmund* for the proposition that a defendant's conduct as an aider and abettor should be punished less severely than that of the killer. Here, however, the shooter, Vlasov, was also sentenced to life without possibility of parole. Neither

Roper nor *Enmund* support defendant's claim that his sentence constitutes cruel and unusual punishment.

Again, given defendant's role in Cindy's murder we cannot find life without possibility of parole is "grossly disproportionate" to his crime.

X. Cumulative Error

Finally, defendant argues he was prejudiced by the cumulative errors committed during trial. Under the cumulative error doctrine, errors that are individually harmless may have a cumulative effect that is prejudicial. (*In re Avena* (1996) 12 Cal.4th 694, 772-773 (dis. opn. of Mosk, J.).) We find no such cascading of error into a pool of prejudice in the present case and reject defendant's final contention.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

CANTIL-SAKAUYE, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DANIIL VALERIYEVICH ZHUK, Defendant and Appellant.	C047365 (Super. Ct. No. 00F02479) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT] (Filed Aug. 15, 2008)

THE COURT:

It is ordered that the opinion filed herein on July 18, 2008, be modified as follows:

On the first line at the top of page 23, the word "proscribes" is changed to "prescribes," so that the entire sentence, which begins at the bottom of page 22, reads as follows:

> In making the determination as to the admissibility of the evidence presented, including declarations of jurors, the trial court must take great care not to overstep the boundaries established by Evidence Code section 1150, which prescribes the scope of evidence admissible to test a verdict.

There is no change in the judgment.

Defendant's petition for rehearing is denied.

BY THE COURT:

BLEASE, Acting P.J.

RAYE, J.

Court of Appeal,
Third Appellate District – No. C047365
S166314

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DANIIL VALERIYEVICH ZHUK,
Defendant and Appellant.

(Filed Oct. 28, 2008)

The petition for review is denied

GEORGE
Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HEIDI LYNNE FLEISS, Defendant and Appellant.	B093373 (Super. Ct. No. BA 083380) (Filed May 28, 1996)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Reversed.

Marks & Brooklier, Anthony P. Brooklier and Donald B. Marks, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, William T. Harter and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

We conclude that jury misconduct requires reversal of the judgment. The dispositive question is

whether several members of the jury agreed to barter votes.[1]

BACKGROUND

Defendant Heidi Lynne Fleiss was convicted by a jury of three counts of pandering. The panel was deadlocked on two other pandering counts and acquitted Fleiss of a single count of providing cocaine.

Fleiss brought a motion for a new trial, in support of which five jurors[2] filed declarations dated December 10, 1994. These are similar and deal with discussions about relative penalties, entrapment, stubbornness of some of the jurors, deliberation difficulties, and misunderstanding of the entrapment instructions. Joseph Lechuga says he and several jurors had discussed the case outside the deliberation room with other jurors absent. He did not think Fleiss had a fair trial because two jurors "presumed her guilty before the foreperson was even selected."

Soon thereafter, the Los Angeles Daily Journal published an article saying that the District Attorney's Office was looking into whether the jurors should be held in contempt or be charged with criminal violations. On December 21, 1994, Mitrowski,

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[1] In light of our decision, we do not reach Fleiss' claim that a mandatory state prison sentence for pandering is unconstitutional.

[2] Sheila Mitrowski, Lorraine Estrada, Zina Alavi, Henry Gipson, and Joseph Lechuga.

Alavi, and Gipson filed declarations saying they had read the Daily Journal article, in light of which they were unable to provide the defense further information.

On February 16, 1995, Mitrowski, Gipson, Estrada, and Lechuga testified on their request for immunity, which the trial court granted. The court granted Alavi (shown as Alair on the minute order) immunity on February 21, 1995, after she testified in support of her motion.

Alavi executed a declaration dated February 22, 1995. Shortly after returning from the noon recess on Tuesday, the first day of deliberations, "one juror immediately and spontaneously stated 'Let's just hang the bitch.'" That juror "essentially refused to deliberate with respect to the case. At times he laid on the couch in the jury room." Alavi described two days of deliberations where the panel split into two factions.

On Thursday, Alavi, Mitrowski, Gipson, and Estrada began to speculate about the potential punishment faced by Fleiss. They deduced that pandering convictions would probably lead to probation and that the drug charge was the most serious. They agreed they "must obtain Ms. Fleiss' acquittal on the narcotics charge." On Friday, a juror said he wanted five pandering convictions in exchange for his not guilty vote on the drug charge. Alavi, Mitrowski, Gipson, and Estrada agreed to vote guilty on three pandering counts. Alavi says she would not have voted to convict

on any pandering charge "had the other jurors refused to vote not guilty on the narcotics charge." She specifically states that she traded guilty votes for the vote of not guilty on the drug charge.

Mitrowski executed a February 23, 1995, declaration, which generally mirrors Alavi's. On Thursday, Mitrowski and Gipson discussed potential punishment. The same day, the two discussed punishment with Alavi. The three agreed to try to get an acquittal on the drug charge. Some conversation took place later that afternoon between the three and Estrada, but the declaration does not mention any discussion of punishment with Estrada present. The next day, Mitrowski, Alavi, Gipson, and Estrada agreed "to vote guilty on three pandering counts in hopes of persuading other jurors to acquit Ms. Fleiss on the narcotics offense." Mitrowski concludes, "I regret that I agreed to and did trade my guilty vote on the pandering counts in exchange for a not guilty vote on the narcotics offense."

Estrada's February 23, 1995, declaration recounts much the same detail as Alavi's and Mitrowski's. On Thursday, Estrada, Mitrowski, Gipson, "and possibly Joseph Lechuga," speculated on the punishment involved. A discussion later that afternoon involved Estrada, Alavi, Mitrowski, and Gipson, but the declaration does not mention it included any conversation about punishment. Friday, Estrada agreed with the others "to vote guilty on three pandering counts in hopes of persuading other jurors to acquit Ms. Fleiss on the narcotics offense." Like

Mitrowski, Estrada concludes, "I regret that I agreed to and did trade my guilty vote on the pandering counts in exchange for a not guilty vote on the narcotics offense."

Gipson executed a declaration February 23, 1995. On Thursday morning, outside the courthouse, he and Mitrowski discussed punishment, concluding that the drug charge carried the more severe penalty. Gipson had Thursday lunch with Alavi and Mitrowski. They discussed punishment and agreed they "must obtain Ms. Fleiss' acquittal on the narcotics charge." Later that afternoon, the three and Estrada had a discussion, but the declaration makes no mention that punishment was brought up at this time. Gipson says he agreed with Alavi, Mitrowski, and Estrada "to vote guilty on three pandering counts in hopes of persuading other jurors to acquit Ms. Fleiss on the narcotics offense." Gipson also regrets that he "agreed to and did trade [his] guilty vote on the pandering counts in exchange for a not guilty vote on the narcotics offense."

Two jurors testified. We set forth pertinent excerpts from and brief summaries of their testimony.[3]

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[3] We feel constrained to comment on the poor quality of the reporter's transcript. It is replete with examples showing a lack of proofreading. We detail but a few. For example, juror Gipson's name is routinely misspelled as Gibson. The word "mind" often appears when what was spoken was obviously "mine." "Frolic" is spelled "fraulic." "Replete" is spelled "repleat." We offer here a

(Continued on following page)

Alavi.

"We decided we were going to stick to our verdicts only if we get the 12 jurors to agree with us, otherwise we are going to go hung."

"This was not a decision I was going to make on my own. It wasn't the way I felt. I wanted to get the six counts – "

"The topic of the conversation was what had happened right before the break. . . . I wanted to know are we all going to go with a guilty verdict on those three counts or are we going to stick to what we believe and vote not guilty on all counts."

" . . . It was an unofficial conversation. ['']Listen, shall we go ahead with this['']. . . . The three guilty verdicts just to get the narcotic charge not guilty. Shall we stick to this." Alavi went on to say she did not remember if someone actually said that, but it was what she was thinking. In response to the question, "Do you remember Ms. Mitrowski saying let's keep voting guilty on these pandering counts so we can get rid of the narcotics?" Alavi answered,

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brief sample from the argument of defense counsel: "Mr. Carter I can force the declaration of Mr. Gibson where he in fact says after page five that we openly discussed the potential punishment faced by this is Fleiss. We speck late that if convicted of pandering she would in all likelihood receive a probationary sentence." We have no idea what "I can force the declaration of Mr. Gibson" means. "[T]his is Fleiss" obviously was spoken as Ms. or Miss Fleiss. "Speck late" would be laughable if this weren't a serious proceeding.

"Maybe," then, "I think so. . . . I think she said that yes, let's do it this way." Alavi then said she didn't remember what words Mitrowski used or if it indeed was Mitrowski.

"I cannot put black and white. We were not like in cahoots. We did not make this big plan. It was a very innocent thing. There was this thing that happened in the jury room. We wanted to see are we going to go along with this or not."

Alavi also testified to "a small discussion" and communication by nods and "body language."

"Q That is when it was agreed that you would in fact do what you said you would do Thursday afternoon which was to vote guilty on pandering in order to have a not guilty verdict on the narcotics; is that right? [¶] A That was not Thursday afternoon. [¶] Q I am talking about Friday morning. Is that correct? [¶] A Friday morning. [¶] Q What you did Friday morning was based upon the agreement that you guys had discussed Thursday afternoon? [¶] A No. Thursday afternoon we had not discussed – we had no idea they were going to offer something like this to us. All we had done Thursday afternoon was discuss what is more serious. How serious would the pandering charge be but not made any decisions. [¶] We did not think we had to trade. We were going to go Friday morning and discuss narcotics charge."

"Q [ ] Now, at some point during the jury deliberations on Friday morning – now we are getting to Friday morning. One of the jurors stated that in

exchange for his not guilty vote on a narcotics charge, he wanted five pandering convictions; is that right? [¶] A Correct. [¶] Q That is what one of the jurors actually said in the jury deliberations; is that right? [¶] A After I mentioned do we want to go out hung and everybody said no, they do not want to go out hung, he brought up this topic. [¶] Q Is it after he said that, that you and Sheila, Lorraine and Henry Gi[p]son agreed together to vote guilty on the three pandering counts? [¶] A With the body language discussion in the jury room? Yes. It was unofficial. [¶] Q Okay. You finally did that in order to persuade the other jurors to acquit Ms. Fleiss on the narcotics; is that right? [¶] A After the break. The final official verdict."

Mitrowski – foreman of the jury.

"There was a conversation that one gentleman shouted something out at the time when we were voting when 11 people had voted not guilty. He made a statement in quite a loud voice and he said I am – let me think now. He said 'I am not going to vote guilty [sic] on this unless we find her guilty on all the other charges.'" Mitrowski testified the others told him that "wasn't an acceptable process." After others managed to calm this juror down, they had a vote on the drug charge. All 12 voted to acquit. After some further discussion, votes were taken on the three pandering counts, but not before Mitrowski, Alavi, Estrada, and Gipson had a separate discussion

between them. This conversation was over whether they "'should go along with it.'"

"Q Did you actually have a conversation at that time during the break where it was said that even though you thought Ms. Fleiss was not guilty on the pandering counts, that because of entrapment, that in fact you were willing to give up your guilty votes because and in part you thought that the penalty for pandering would be not substantial? [¶] A That's correct. And we thought it was much more important to convince the other jurors to give us a not guilty on the drug charge. [¶] Q And you used that, you and the other jurors, used that – you sort of horse traded, right? [¶] A We didn't horse trade directly with them. We discussed it amongst ourselves in an effort to get their cooperation. [¶] Q There were actual discussions between you, Zina, Lorraine Estrada and Henry Gi[p]son during the break on Friday before the verdict was returned that you were willing to give up your not guilty votes even though – pardon me. You were willing to give up your not guilty votes because you thought the penalty was less severe in order to get a not guilty on the drug charge; is that right? [¶] A Absolutely. [¶] Q Those are the words actually spoken? [¶] A Yes."

"A That gentleman said very definitively and shouted out very loudly that he wasn't going to vote guilty – pardon me. Not guilty on the drug charge unless we all voted guilty on . . . all the pandering counts. [¶] Q And then it was after that you had the discussion outside the building or outside the jury

deliberation room with Zina Alavi, Lorraine Estrada and Henry Lee Gi[p]son; is that right? [¶] A Yes. [¶] Q Was it at that point that again the punishment was actually discussed? [¶] A Yes. [¶] Q Was it at that point during the course of that conversation with the four of you said that you were willing to give up your not guilty votes on pandering if you could get the not guilty on the drug charge because of penalty? What you thought the penalties were? [¶] A That is pretty much exactly how it went. [¶] Q These are actual words spoken between the four of you? [¶] A Yes. Yes."

At the end of Mitrowski's testimony, the prosecutor said if the court did not want to hear more testimony, he would be willing to submit on Alavi's and Mitrowski's testimony. The court immediately excused Estrada and Gipson.

Counsel argued the matter. The prosecutor's position was that the declarations and testimony revealed nothing more than jurors who were attempting to improperly impeach a verdict with which they had become disenchanted. He attacked their credibility, arguing that the declarations were obviously all prepared by the same person and suggesting that the information in the declarations had been fed to the jurors. He argued that the evidence did not show an actual agreement to trade votes, but rather showed jurors who engaged in an improper mental process in order to arrive at their votes. Since a juror's mental process is not admissible to impeach the verdict, the argument goes, a juror's subsequent unhappiness with his vote does not call for a new trial.

The trial court denied Fleiss' motion for a new trial. The court concluded there had been misconduct, but that it was not prejudicial. Without further discussion, we agree with the trial court's findings as to the following three allegations of misconduct: A juror committed misconduct by looking up words in a dictionary and reporting to the other jurors. It was misconduct to discuss penalty. Discussion of another narcotic investigation involving Fleiss constituted misconduct but did not cause her prejudice because the jury acquitted on the drug count. This appeal turns on the remaining question of whether certain jurors traded votes on different counts.

DISCUSSION

Respondent's argument on appeal is that the trial court made a finding of credibility as to the jurors' declarations and testimony and "impliedly rejected the allegations that were presented both at the hearing and in the affidavits." We agree with respondent that *if* the trial court found no bartering took place, that ends the discussion on the point. We are not at liberty to undo a trial court's factual findings based on sufficient evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) However, the trial court made no specific findings on this score, as respondent acknowledges by referring to an implied rejection of misconduct allegations. Thus, we are left to infer from this record just what the trial court concluded as to whether jurors engaged in bartering.

The trial court acknowledged that it "has a duty to assess the credibility of the juror witnesses." During the bartering discussion, the court stated the following: "In assessing the credibility of the juror witnesses, it was apparent to the court that in each opportunity to describe their acts of misconduct, these acts seemed to grow. A little like Pinnochio's [sic][4] nose. The court is mindful that when the jurors were polled following the verdicts, each juror, including jurors Mitrowski, Estrada, Gi[p]son, Alavi, all stated unequivocally that those were their verdicts. [¶] Thereafter, the jurors learned about the mandatory sentencing scheme having already become advocates for the defendant, they set about to impeach their own verdict. Motive on the part of these juror witnesses is something that the court has considered."

If we limit ourselves to this, it appears the trial court rejected the jurors' testimony about bartering. However, the trial court, during this discussion on the bartering allegation, finished its comments by saying, "Without minimizing the seriousness of the misconduct here, I find that there is no substantial likelihood that the misconduct prejudiced the defendant and the motion for the new trial is denied." If the court was referring to bartering here, we can only conclude, since it made reference to misconduct, that it had determined bartering occurred. We infer, for a couple of reasons, that the trial court was talking

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[4] See footnote 3.

about bartering here. The trial court had already dealt with the other misconduct allegations at the beginning of its comments. It said it was going to "look carefully at each area of misconduct. . . ." It then, in three discrete parts of its discussion, disposed of the allegations that jurors used a dictionary to look up terms, improperly learned of a narcotic investigation not part of this case, and discussed penalty. As noted above, the trial court found misconduct in each area, but concluded it was harmless.

The trial court then commenced its discussion of bartering as follows: "On another subject, the suggestion that certain jurors traded their verdict in order to achieve a specific result was of concern because obviously a verdict decided by lot or by any means other than a fair expression of opinion on the part of all the jurors, would be a violation of law." This discussion included the "Pinocchio's nose" comment and ended with the comment about not "minimizing the seriousness of the misconduct here[.]" During the discussion, the court referred to *People v. Blau* (1956) 140 Cal.App.2d 193, and said the case was "still viable and . . . appears to be on point." The trial court read *Blau* as holding "that this type of compromise did not constitute prejudicial misconduct." Both sides agree the trial court erroneously relied on *Blau*.

In *Blau* several defendants were charged with one count of conspiracy to commit theft and falsify corporate records, and two counts of grand theft. Two, Blau and Fisher, were convicted of the conspiracy and two counts of petty theft. "On their motion for a new

trial appellants submitted an affidavit of one of the jurors in which she stated that the verdict was the result of a compromise; some of the jurors who were inclined to vote in favor of Mays' guilt voted for his acquittal when other jurors who were in favor of acquittal of the appellants agreed to vote in favor of the guilt of Blau and Fisher of a lesser offense." (*People v. Blau, supra,* 140 Cal.App.2d at p. 217.) The *Blau* trial court denied the motion for new trial and the appellate court affirmed.

In sum, on the question of whether the trial court accepted or rejected that bartering had occurred, we must conclude the former. The sequence of discussion with the court first disposing of other misconduct allegations, followed by "another subject" (bartering), reliance on *Blau* with the comment that "this type of compromise did not constitute prejudicial misconduct," and the comment about not minimizing the seriousness of the misconduct, all lead us to conclude that the trial court made the factual determination that bartering had occurred, but, relying on *Blau,* erroneously concluded it was not prejudicial. Of no small consequence is that the trial court heard from Alavi and Mitrowski, then, based on the prosecutor's willingness to submit without further testimony, deemed it unnecessary to hear from Estrada and Gipson. These jurors, however indirect their declarations might have been on the bartering question, stated in those declarations that they had traded their not guilty votes for guilty ones. We do not see how the trial court could say no trading had occurred

without taking the testimony of two available witnesses who previously said it had. While the evidence presented in this record is subject to varying interpretations, the circumstances shown by the record persuade us that the trial court accepted that interpretation showing bartering had occurred. A finding of bartering necessarily means that not guilty votes were traded for guilty votes.

Of course, all this analysis would have been unnecessary had the trial court simply stated its conclusion one way or the other.

Blau did not hold that bartering votes is not prejudicial misconduct. Without discussion, the appellate panel merely stated the rule then in existence that "[j]urors may not impeach their verdict by affidavit that it was the result of compromise, or for other irregularity other than that it was arrived at by chance. [Citations.]" (*People v. Blau, supra,* 140 Cal.App.2d at p. 217.) In *People v. Hutchinson* (1969) 71 Cal.2d 342, the California Supreme Court discussed Evidence Code section 1150, which became operative in 1967, well after the 1956 *Blau* decision. That section limits "impeachment evidence to proof of overt conduct, conditions, events, and statements. . . . This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.

[Citations.]" (*People v. Hutchinson, supra,* 71 Cal.2d at pp. 349-350.)

Accordingly, in the instant matter, evidence of discussions in response to one juror's demand for guilty votes in exchange for his not guilty vote was admissible and provides sufficient basis to justify the trial court's conclusion that some members of this jury traded their votes.

That trading votes constitutes prejudicial misconduct is not reasonably open to debate. (*See, e.g., People v. Guzman* (1977) 66 Cal.App.3d 549.) Such malfeasance strikes at the heart of the justice system. All citizens have two opportunities to participate directly in their representative government – voting and jury service. Both are to be taken seriously and engaged in responsibly. The involved jurors in this case took their solemn duty to impartially dispense justice and turned it into advocacy for a cause. All parties in the justice system are entitled to know what the rules of engagement are and should be able to count on those rules being followed. This was supposed to be a trial, not an auction. The jurors involved in this misconduct committed a transgression worse than those with which Fleiss was charged. Through no fault of the court, the litigants, or their representatives, those jurors turned this serious proceeding into a farce. This verdict resulted not from the evidence, but from extraneous and improper considerations.

Fleiss was entitled to a trial by a jury of 12 persons. A jury is defined as "[a] certain number of men and women selected according to law and *sworn* [ ] to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them." (Black's Law Dict. (5th ed. 1979) p. 768, col. 1.) Certain members of Fleiss' panel violated their oaths, ignored the evidence, abandoned their duty to seek the truth, and turned deliberations into a bazaar. These jurors did not act as a jury. Fleiss did not truly receive a trial by jury. The guilty verdicts rendered by this panel cannot stand.

DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings.

NOT TO BE PUBLISHED.

/s/ Ortega
ORTEGA, J.

We concur:

/s/ Spencer
SPENCER, P.J.

/s/ Vogel
VOGEL (Miriam A.), J.